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THE
LAW QUARTERLY
REVIEW.

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THE LAW QUARTERLY REVIEW.

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THE LAND SYSTEM OF IRELAND. II.

SOME months ago I endeavoured to describe, in the pages of the LAW QUARTERLY REVIEW, the long train of historical facts, which have formed the existing Land System of Ireland, and have given it its peculiar type and complexion. A revolution in that system has already occurred, and we are on the verge, probably, of even greater changes. The Legislature, at the instance of a Tory Government, has largely curtailed, by a recent statute, the twice invaded rights of the Irish landlords, and has increased the privileges of the Irish tenant; and, in accordance with the prevailing theory, that the ownership of the soil must be transferred to the peasantry of Ireland, in the national interest, a measure of Land Purchase, on an extensive scale, has been announced by Lord Salisbury's Ministry. The crisis will be, no doubt, quickened by the consequences of a disastrous harvest, and by the continuing fall in prices; and the effects of the proclamation of the National League will co-operate in the same direction, for they will give new prominence to the Irish Land Question. I have been invited, at the request of friends, in whose sound judgment I have complete faith, to express my views on the subject generally, and to lay down what I conceive to be the true principles of that searching reform and resettlement of the Irish Land System which, on all sides, is allowed to be imminent. I hope I am not conceited enough to suppose that my opinions are of peculiar value; indeed, I have reason to feel distrust in them, because they conflict in capital points with notions and judgments that, at this conjuncture, are certainly dominant in this matter. But the conclusions I have formed have been carefully made, and flow from long study and ample experience; and, at any rate, every one who has the slightest claim to speak with authority on this subject, may justly take part in a great controversy involving interests of supreme importance. For the rest, I do not forget my

position : a Judge in Ireland must take care not to exasperate passions and feuds of class already stirred into fierce activity ; an Irish landlord, even though severed from Irish 'landlordism' by old family memories, must not see facts through the eyes of his order ; and though I shall touch a burning question, I shall endeavour not to increase its heat, and I shall avoid as much as possible the politics of the hour.

In my previous article I traced the causes which had stamped the Irish Land System with its special character. In three out of the four parts of Ireland, and even to a considerable extent in Ulster, a succession of often recurring conquests, followed by confiscations, repeated and ruthless, had placed the ownership of the soil in the hands of a caste, distinct from the people in blood and in faith ; had violently destroyed the archaic usages of the Celtic tribes as regards the land ; and had reduced the mass of the Irish race to the position of serfs under foreign masters. This settlement of the sword and of forfeiture was aggravated and prolonged for a century and a half by a Penal Code of extreme severity, and by a Commercial Code of peculiar harshness ; and absenteeism, on an immense scale, contributed powerfully to increase its mischiefs. The natural consequences of this state of things were that sympathy and kindliness could scarcely grow up between the races which, planted in the land, lived locally connected but morally severed ; and the resulting evils were largely multiplied, and were made inveterate, lasting, and intense by the circumstances of a country in which population pressed severely upon the means of subsistence, and in which agriculture was almost the only industry. In this way, in perhaps five-sixths of Ireland, a Land System was formed which, whether we view it in its historical or its economic aspects, must be deemed to have been one of the worst in Europe. In the great relation of landlord and tenant, embracing nine-tenths of the Irish community, oppression, exaction, and want of good feeling became too characteristic of the ruling class, while listlessness, ignorance, and servile vices were distinctive qualities of the mass of the peasantry. A mode of land tenure generally prevailed which made the occupier of the soil a mere dependent, enabled his lord to destroy his rights, acquired morally in a variety of ways, though not under the protection of law, and placed no check on acts of the harshest kind ; and this condition of affairs was rendered permanent by a state of society in which the possession of land was fought for as a first necessary of life, and in which teeming millions were on the verge of misery. Nor can it be said that the essential features of this Land System were very greatly changed, until long after the famine of 1846, though cer-

tainly they had been much mitigated ; nor have they yet even nearly disappeared. The great body of the landlords of Ireland are different beings from their forefathers ; but, from the nature of the case, they remain divided in sympathy from the aboriginal children of the soil. Absenteeism, too, from Ireland has, perhaps, increased, with its long train of pernicious consequences ; and the immense transfer of land, which has been the result of the operations of the Encumbered Estates Court, has created a class of generally exacting landlords. Nor can it be denied that the Irish peasantry, though I gladly acknowledge their real excellences, have displayed, during the late troubled years, the qualities of serfs let loose from bondage. Many have been associated with deeds of blood ; thousands have been lawless in the worst sense, and have repudiated even the fairest contracts ; and, as a class, they have lent a willing ear to sinister appeals to mere greed and passion. Most important of all, until seventeen years ago, whatever was vicious in Irish landed arrangements, on their economic side, was but little altered ; precarious tenures generally prevailed ; and, owing to this bad and iniquitous system, the tenant lived under a law of *sic vos non vobis* ; and it was possible for landlords by increasing rent, by eviction, and even by less severe processes, to annihilate rights acquired by purchase, to confiscate property made by improvement, to extinguish concurrent equities in the land in many instances of very large value. Though public opinion condemned such wrongs, they were occasionally done in different ways ; and, except in a part of Ulster, where a tenant-right usage protected the tenant to a great extent, these were the general conditions of Irish land tenure.

Mr. Gladstone, in 1870, addressed himself, for the first time, to the arduous task of reforming this thoroughly bad Land System. The measure he passed through Parliament went as far, perhaps, as was warranted by the opinion of the day ; but it is to be regretted that it was not more simple and bold ; and though it contained much that was just and excellent, and was ingenious in the highest degree, it was marked by the over-subtlety, and the want of finality, characteristic of his peculiar statesmanship. The Land Act of 1870 was a skillful attempt to adjust the proprietary rights of the Irish landlord, still completely absolute in legal theory, with the moral but unprotected claims of the tenant ; and it dexterously endeavoured to effect its object, without shocking English sensitiveness about freehold ownership. Adapting itself to Common Law precedents, it legalised the Ulster tenant-right usage—a custom which, by permitting the sale of farms as between successive occupiers, created a valuable property in the ‘goodwill’ of them,—and it gave the same sanction to

inchoate usages, analogous to that prevailing in Ulster, which had begun to grow up in the Southern Provinces. Its most striking feature, however, appeared in the means it employed to guard and secure the equities in the land, as yet not law-worthy, and liable to be destroyed by the landlord, which had gradually been acquired by the Irish peasantry. Under many restrictions and limitations, the tenant was declared to have a title to different kinds of improvements added to the land; and compensation for these was adjudged to him. By an innovation, too, very bold for the time, every yearly tenant was deemed to possess a general claim to 'goodwill' in his farm; for when 'disturbed' by a notice to quit, he was to receive compensation on a liberal scale; and thus a right, almost of a proprietary kind, was engrafted on nearly all Irish tenancies. The same result followed from a short provision which made the landlord liable to repay sums paid by tenants upon the transfer of farms, if the transfer was made with his consent, for value, an enactment which, in many thousand instances, created a tenant right of the most important kind. It should be observed, however, that though the Act appeared to protect, with extreme care, the concurrent rights of the tenant on the soil, it made little or no interference with the right of the landlord to fix rent, or to raise it at pleasure, where there was not a lease, a very uncommon mode of tenure; and the claim of the tenant to what had been made his property was not made available while he retained his farm; for it was only when he was about 'to quit the holding,' that the statutable compensation was to be paid.

This legislation of course could only deal with the economic ills of the Irish Land System; but it should be observed that Mr. Gladstone, when he glanced at the history of the subject, spoke favourably of the Irish landlords, and especially dwelt on the many evils that would follow the general expropriation of the class. The Land Act of 1870, though it looked well on paper, undoubtedly was of real use, and possibly might have solved the problem, had Ireland been in a normal state, failed to satisfy the wishes of the occupiers of the soil, and even fully to assure their rights; and the reasons of this are now apparent. In the first place, it was too complicated to be intelligible to the ordinary peasant, and to strike his imagination as a real boon—an immense defect in a reform of the kind; and as its benefits were to be obtained only through costly litigation in a Court of Justice, these were, in many instances, placed beyond his reach. In the second place, the change in the law was made after the minds of the people had been deeply stirred by the supposed prospect of a revolution in landed relations; and what only a few years before would have been welcomed as a

magnificent gift, was viewed as a disappointing and tardy concession. Independently, however, of considerations like these, the statute did not fully attain its ends, and fell short of doing complete justice; and this largely owing to peculiar circumstances incidental to the state of Irish land tenure. As the landlord was left free to fix the terms of rent, under social conditions in which the rate of rent was forced up by an intense competition for land, he retained power of an excessive kind; as the tenant could only obtain the advantages conferred by the law by giving up the holding which usually was his sole means of existence, and to which in all cases he was passionately attached, he still remained in a subject position; and, this being the case, the results followed where authority and dependence have conflicting interests. The statute was evaded in many cases; in others, possibly not frequent, but sufficiently so to create discontent, the rights of the tenant were squeezed out, by the raising of rent, and other devices; and, on the whole, the Act, which, it should be added, fell on times of great alternations of prosperity and distress, inauspicious in the extreme to its success, did not afford the complete protection to the equities in the land of the Irish occupier, which it had been the object of its author to assure. The great peasant rising of 1879-80, the vast power suddenly attained by the Land League, the crusade against 'landlordism,' that was the result, and the agrarian agitation of the last eight years—all this indicates that the Act of 1870 did not remove the ills of the Irish Land System; and though it was largely amended in 1881, and it keeps its place in the Irish Land Code, it has long ceased to have real influence, and it has practically been relegated to the crowded limbo of ineffectual experiments on the Irish land.

Mr. Gladstone took up, for the second time, the amendment of the Irish Land System, in the agony of a great social convulsion. The celebrated Land Act of 1881, supplemented by that of 1887—this last passed by Lord Salisbury's Government—was the fruit of his renewed labours; and it has almost transformed the Land System of Ireland. The idea of this measure was to provide a permanent and assured protection for the equities in the land of the Irish tenant, and yet to maintain the proprietary rights of the landlord as far as this was possible; and, to effect this object, Mr. Gladstone followed the principles of a mode of land tenure long advocated by reformers of the Irish land, and, though somewhat timidly, praised by O'Connell. With exceptions as to certain kinds of farms, the Acts of 1881 and of 1887 declare that, as an equivalent for their concurrent rights in the soil, the great body of the tenant class in Ireland, whether holding from year to year, or by lease, shall have a title to commute their tenures into terms

lasting for fifteen years, but practically renewable for all time, if the conditions attached by law are observed ; and in order that no means may exist to defeat or reduce the tenant's interest, the rents reserved on the terms thus created are to be adjusted through the intervention of the State, and are not to depend on the landlord's estimate. The 'goodwill' of the statutable terms is rendered saleable under some restrictions, according to the Ulster tenant-right usage, and analogous usages in the other provinces ; and it is specially enacted with the view of gaining for the tenant's rights still further protection, that rent shall not be charged on improvements made by the tenant, and not in some way compensated. By these means, an estate subject to perpetual renewal, at a State-settled rent, and under conditions by no means onerous, is drawn, so to speak, out of the fee, and vested by statute in the occupier of the soil ; and Fixity of Tenure, Fair Rent, and Free Sale—rights claimed for him under the name of the three F's—have been amply conceded by Parliament. Although, too, it is vain to deny that this legislation has, to a great extent, diminished the legal rights of the landlord, and has assimilated them, in some respects, to a rent-charge, these rights, nevertheless, are largely retained ; and it¹ is simply ignorance to compare his status to that of a rent-charger only. His freehold estate is, no doubt, capable of being bound, if the tenant pleases, by what practically is a perpetual lease ; but he is left many of the rights of ownership ; he still possesses complete property in woods, minerals, and what are known as 'royalties ;' he has a title to have his rent revised at the end of successive terms of fifteen years ; he is remitted to his full proprietary rights should the tenant's interest become forfeited by violating the conditions imposed on him ; he preserves his existing legal remedies of Ejectment, Action, Distress and Injunction ; and in some cases, he is even permitted, under certain restrictions, to resume the land entirely discharged from the tenant's claims. His position, therefore, is quite different from that of the owner of an annuity or a charge ; and it is very unfortunate that false notions of this kind have been widely propagated. It should be observed, moreover, that immense as are the privileges conferred by the recent law, the tenant can only obtain these by an application to the tribunals of the State ; directly or indirectly he must get his new rights through the Land Commission or the County Courts ; and though the Act of 1887, which gives leaseholders, for the first time, the benefit of the law, will doubtless produce a large number of claims, still, as a matter of fact, scarcely more than a third of

¹ Yet we see this proposition repeatedly stated in the English press, and by respectable writers who ought to know better.

the tenant class of Ireland have availed themselves of the advantages of the improved mode of tenure, and many thousands certainly will never approach the Courts.

The true objections to the Acts of 1881 and 1887 are sufficiently obvious to impartial persons. There is nothing in the charge that they interfere with 'free contract' and 'economic laws;' for 'free contract' could seldom exist in Ireland in the peculiar circumstances of her Land System, and 'economic laws' can only fairly work where there is an open and active market, and this, in the case of the Irish land, was not to be found. It is thought sufficient wholly to condemn these statutes because they have 'created dual ownership;' but, in the first place, this is a complete mistake; and in the next place, as I shall point out presently, there is nothing inconsistent in 'dual ownership' with national prosperity and good landed relations, and the objection is a mere fallacy of the hour. The Acts of 1881 and 1887, however, are certainly open, like that of 1870, to the charge of being over-subtle, costly, and not final, defects of a very important kind; and, by interfering with the right of absolute ownership, they may, to a certain extent, prevent the process of making a class of improvements on estates, such as arterial drainage and building large farmsteads, which, from the nature of the case, must be made by landlords, though considering that Ireland is a land of small farms, in which whatever value is added to the soil must necessarily be mainly the work of the peasantry, much stress cannot be laid on this circumstance. On the other hand, the merits of these great remedial laws are conspicuous, whatever may be said to the contrary. With all their imperfections they do largely protect the equities in the land of the tenant class, and that nearly for the first time; they tend to the reconciliation of law and fact throughout the sphere of relations in the land; they fall in with popular wants and ideas; and, above all, they contain the principles of what I believe would form, when fully developed, the true system of Irish land tenure. It has¹ been alleged, however, that they have completely failed, and that the Land System of Ireland must be remodelled on a plan of a different, nay an opposite, type. In the first place, I deny the fact: the Land Act of 1881, grave as are its faults, has, though only a few years old, already had the very best results; the Act of 1887 is still untried, but necessarily must have the same operation; and, in the next place, if the first measure has not borne the full fruit that might have been hoped for, the reasons are plain to candid observers. The inherent defects of the Act of 1881—and that of

¹ This assertion is one of the many conclusive proofs of the ignorance prevailing on the subject.

1887 is on the same lines—have told against its efficient working : the peasantry could not have full sympathy with a reform that did not come home to their minds, and that seemed, to a certain extent, a mystery ; the cost incurred by seeking the benefit of the law has deterred thousands from applying to the Courts ; and many of the shrewder members of the tenant class believe that the Acts are transitional only, and that even better measures are in a near prospect. These reforms, again, it must be borne in mind, have been largely deprived of their grace and efficacy from the circumstance that they became law when Ireland was in an anarchic state, and that they are largely due to the work of agitators ; and, unquestionably, from motives which I do not care to analyse, the Land League and the National League have used their enormous influence, in a great many instances, in frustrating the operation of the Act of 1881, especially as regards the free transfer of farms. Lastly, and this, perhaps, is the most important matter, these measures have coincided in point of time with agricultural depression of the severest kind and with a sudden and remarkable fall in prices ; the ‘ fair rents,’ settled only a few years ago, are at present felt to be so onerous that the Act of 1887 has interfered with them ; and this has made the tenant-farmer suspect the law, and has blinded him to the immense advantages it confers¹.

The Irish Land Question, however, is confessedly a still unsettled problem ; and it has been so mixed up with agitation and passion, that a comprehensive and final reform of the Irish Land System is felt to be needed. The direction which that reform should take is shown in an expression of public opinion which, if questionable, on many solid grounds, is certainly widely heard at this moment. The recent Land Acts, it is said, have created that intolerable thing, dual ownership in land ; under this system rights are inextricably confused, and estates can be no longer improved ; and in Ireland, besides, what is called ‘ landlordism ’ is a state of things that cannot continue. Irish landlords, therefore, must be got rid of, almost wholly, by a far-sweeping change ; and dual ownership must be abolished by transferring the fee, in a freehold tenure, to the great mass of the Irish tenant-farmers, and thus forming a people of peasant owners. The way to accomplish this is to buy out the rights of the landlords through the intervention of the State ; and these interests having been thus acquired, the State, either directly, or through its agencies, would regrant the lands, to their present occupants, to be held of it as absolute owners, subject

¹ The restless anxiety to tear up again the Settlement of 1881—as if any law could in a few months remove the ills of centuries in land tenure—is another evil sign of the ineptitude of English opinion on this subject.

to a rent-charge only which would discharge the sums payable to the old proprietors, and which, were the credit of the State pledged, would be not only less than the existing rents, but would cease after a given period of years. Whether the expropriation of the landlords which is thus to take place is to be compulsory or not seems to be uncertain; but it is a *sine quâ non* that it is to be general; and as a scheme of expropriation, voluntary in name, could be made compulsory without difficulty—the terms offered by the State under the supposed plan, involving an immediate reduction of rent and the extinction of rent in the course of time, would, for instance, force landlords, as a class, to sell—we must regard such a measure as a settled project to annihilate the present owners of the Irish land, and this, indeed, is openly avowed. It should be observed, moreover, that we are not informed by the sanguine advocates of this policy what compensation is to be given the landlords, for the extinction of their proprietary rights, or indeed, from what fund compensation is to come, except from the rent-charges representing their rents; nor are we told how, and to what extent, the credit of the State is to be involved, and the general tax-payer to be made liable. Even the machinery through which the rent-charge payable by the new peasant owners is to be collected—a point of supreme importance—is not indicated; we only hear that the State must buy out the landlords, and place the occupiers of the soil in their stead, by a large but indefinite scheme of Land Purchase; and when this shall have been accomplished, the Irish Land Question, it is assumed, will have been settled; the Irish Land System will have been placed on the solid and lasting foundations of right; and the peasantry of Ireland, turned into owners of their holdings at a low terminable charge, will faithfully discharge their obligations to the State, and will become contented and law-abiding subjects.

It is curious to note how this theory has found advocates among classes and persons of the most opposite views and opinions. The Land League and the National League demand a transfer to the peasantry of the Irish land, because they avowedly aim at the ruin of landlords. Doctrinaire thinkers wish to see the experiment of petty farm ownership extensively tried; English Radicals conceive that an Irish precedent would second their designs against 'landlordism' at home; untaught by the lessons of Irish history, some statesmen¹ believe, or pretend to believe, that a fresh confiscation, on a gigantic scale, would create a new 'loyal Irish interest.' Absentees from Ireland, too, are disposed to sell; mortgagees of Irish estates are eager to realise securities now in grave danger;

¹ It is simply melancholy to notice the prevalence of this delusion.

and many Irish landlords, especially those of the encumbered and the exacting classes, cry out for a measure which, they hope, might rescue them from impending shipwreck. The general expropriation of landlords in Ireland, through the agency of the State, is thus favoured by powerful although conflicting interests; and, as I have said, a scheme of Land Purchase is part of the programme of the present Government. The only arguments, however, openly urged on behalf of this policy are miserably weak, and are scarcely worthy of serious attention. 'Dual ownership,' which is denounced as unbearable, prevails in most of the land systems of Europe, and even, to a considerable extent, in England; it has been the peculiar glory of Ulster under the name of the tenant-right usage; instead of creating it the recent Land Acts have only given it the sanction of law; and if it does, in a certain degree, prevent the making of large improvements of land, this mischief is as nothing compared to the good which has flowed from the reform of Irish tenures, and it is an evil, besides, which admits of a remedy. In fact the clamour against 'dual ownership' is partly founded on the prevailing ignorance respecting the facts of the Irish Land System, and is partly an appeal to English prejudice in favour of absolute freehold ownership; but it really means that Irish landlords can no longer claim proprietary rights, and are, many of them, in a position of hardship; and, as an argument, it is almost worthless. Again, after the revolution which has passed over Ireland, I agree that 'landlordism,' in its present form, can scarcely have a protracted existence; but that is no reason why Irish landlords should be generally expropriated and deprived of all rights in their lands, through the interposition of the State. The arguments against any scheme of the kind appear to me to admit of no answer. Let us regard this policy first from the point of view of justice; and all Irish history, and the calamitous history of the Irish land¹ in a special manner, is a warning against the violation of rights in this matter, for supposed expediency. An immense majority of the landlords of Ireland would consider it an intolerable wrong that their lands should be forcibly taken from them, or be filched away by a device of State-craft; how can this be accomplished on any plea of equity, especially as Mr. Gladstone himself has repeatedly asserted that, as a class, they have done nothing that deserved forfeiture? Are the O'Connor Don, and the Duke of Leinster, and the Duke of Abercorn, and Lord Portarlington, representative types of different races established upon the Irish soil, but all known as beneficent landlords, to be driven from their homes by

¹ Why too is the Union still condemned in *Irish* opinion? Because it began in wrong. The precedent is significant.

confiscation by force, or by what would be even more odious, a manoeuvre that would 'rig' the land market against them? The idea seems to me simply shocking; and, passing from what is general to details, the iniquity of this policy becomes apparent everywhere. For example, the great body of Irish landlords possess family mansions and demesnes, not to speak of forests, of woods, of plantations; but it is not contemplated to deal with these, for the intended plan is to apply only to lands held as farms by *bond fide* occupants. Are the landlords, therefore, when deprived of their estates, to be obliged to retain these fag-ends of them, the appurtenances of what had been their property; or are they, if, as would probably happen, they should resolve to depart for ever from Ireland, to be driven to sell them at a price which would be¹, from the nature of the case, little more than nominal?

Unjust, too, as is the idea of this scheme, it would be, I think, impossible to carry out, except through the perpetration of wrong to which Parliament will never assent. If Irish landlords are to be bought out wholesale, the policy of every civilised country requires that they should be compensated in full; and this could only be done by a payment in cash, or by the creation of a stock or of a kind of debentures, guaranteed by the Imperial Legislature²; for—without speculating on the possible results of the agitation for Home Rule for Ireland—the guarantee of the unborn 'Irish State' cannot at present be even considered, and, in no event, probably, could be deemed adequate. The compensation, however, if right is to be done, has been estimated by Mr. Gladstone at not less than £300,000,000; and though this sum is, I conceive, too large, it cannot fall short of £200,000,000, and those who have reduced it to £140,000,000 have made, I think, a complete mistake. But is it possible to suppose that £200,000,000, or British securities of an equal amount, will be forthcoming as compensation for the State-purchased estates of Irish landlords? The obligations in this matter of England are, I admit, weighty: the title to nineteen-twentieths of the Irish land is held under an Act of Charles II; the enormous sum of £52,000,000 has been invested in the purchase of estates in Ireland under an Act of this reign; the increased security of Irish landlords was one of the inducements to pass the Union; to destroy, or even ruinously to impair, the rights of

¹ This has already been prefigured in intended legislation. Under Mr. Gladstone's defunct Land Purchase Bill of 1886, Irish landlords were to be allowed to obtain for their 'Demesnes' a price equivalent to their worth as 'agricultural holdings'—that is perhaps 7 shillings in the £.

² This article was written before Mr. Arnold Forster's proposed solution of this difficulty was published. His plan in my opinion deserves the severest censure, but is not worth discussing as it cannot bear examination. It is useful, however, as indicating the difficulties of any scheme of general Land Purchase.

Irish landlords without affording a reasonable equivalent, would be as dishonest as the repudiation of the National Debt; and I certainly think, after what has happened, that the class have a claim to consideration and support, and even to help from the credit of the State, in any final settlement of the Irish Land Question. But that the general tax-payer should be made responsible, directly or indirectly, for a gigantic sum, equal to the indemnity of the war of 1870, in order to try the mere experiment of expropriating Irish landlords *en masse*, and placing peasants in their stead as owners, appears to me a Laputan dream; the proposal will certainly not be made, and the notion cannot, I maintain, be justified, on any grounds of equity or national duty. If compensation, however, on this immense scale, cannot be made available, the whole scheme must fail; the essence of it is to buy out the landlords, through the agency of the State, and to give the tenants the land at terminable rents less than those now current, and if a necessary condition of this transaction is found to be impossible to fulfil, the arrangement, it follows, cannot be made. The only alternative would be to offer the landlords no compensation at all, or compensation of an illusory kind; and England, assuredly, will give no countenance to projects of simple rapine and fraud.

The principle of this scheme being thus impracticable, as I hope I have shown, it becomes unnecessary to discuss its details, more especially the machinery to work it out, a matter, I have said, of extreme importance. If the project, however, could be made feasible, would it really conduce to the welfare of Ireland? Consider it again on the ground of justice, not from the landlord's but from the tenant's side, and I ask what title have Irish tenants to drive their superiors from their lands and their¹ homes, and to be turned into owners at terminable rents; and this at the cost of an enormous sum, at the risk of the mass of the general tax-payers? They have a right to have their equities in the land protected to the fullest extent, nay it is advisable, in the interest of peace, and of a complete settlement of a great social question, to concede even more than is strictly their due; but they have no right to destroy the position of a class, and to possess themselves of a gigantic bribe, which would mortgage the industry of the three kingdoms: and if this be so, an arrangement of the kind, being essentially unfair, could never prosper. If the scheme, however, from this point of view, and indeed from every other, is radically unjust—

¹ It is coolly assumed by the advocates of wholesale expropriation that landlords if deprived of their estates would, as a class, retain and live in their houses and demesnes. This is, I believe, a complete delusion. My own feeling at least would be *tout ou rien*; and I hold the small remains, of what had been an immense inheritance, by a title antecedent to the First Norman Conquest of Ireland.

and justice, I repeat, should be always our guide in efforts to deal with the Irish land—is it commendable on any grounds of expediency? The general expropriation of Irish landlords means the banishment from Ireland of an order of men who, whatever have been their faults and shortcomings, have given the State more than a fair proportion of eminent and even of illustrious names, have, in the past, been the mainstay and prop, in perilous times, of the British connexion, and remain the natural leaders and guides of some of the best parts of the Irish community; and, in our own time, the class is the main agency to perform functions of the most important kind, in the administration of justice and in county government. I wish to avoid controversial politics, but, in the existing state of Ireland, would it be safe for England, or wise, as regards hundreds of thousands of loyal Irish subjects, to expatriate an aristocracy like this; and, if it were gone, where could we find in Ireland—a country without a powerful middle class, as regards education extremely backward, and torn by faction, ill-will, and disorder—the elements of a trained and impartial magistracy, and of capable Grand Juries and Local Boards? I entirely agree with Mr. Gladstone—he has said so over and over again—that landlords form an essential member of the organised frame of the Irish nation; and I firmly believe, if they were severed from Ireland, that it would be necessary to replace them by a bureaucratic regime, a bad and very unpopular type of government. A peasantry, again, which has acquired land, and has become its owner upon a great scale, through its own exertions and its well-applied industry, will be a sound and wholesome element in a State; but it is idle to argue from such a case that a proprietary of peasants suddenly called into being without an effort of its own—the forced creation of a perplexed Parliament as a concession to agitation of extreme violence—would exhibit qualities of this kind; and it seems to me to be mere folly to think that Irish tenants, made owners wholesale of their holdings under conditions like these, would become a law-abiding and a conservative power, and be really loyal and contented subjects. The assumption, too, I conceive, would be equally vain that, in such circumstances, they would readily pay the terminable rents belonging to the State: they would have gained much through their leader's policy, and they would be easily induced to contend for more; and plausible arguments would not be wanting to urge them to repudiate what they would be told was a tribute to a foreign and an absentee Power¹. A revolutionary settlement of

¹ Surely we have had revolutionary settlements enough of the Irish land; and how have they prospered?

this kind, in a word, would lead to confusion and could not prosper.

'You have destroyed every interest you have built up in Ireland, and have never conciliated the native race'—this bitter remark of a distinguished Irishman not unfairly describes the scheme of wrong and of un wisdom thus briefly noticed. A final settlement of the Irish Land System ought, I think, to be based on different principles, and to be constructed on lines in another direction. The Acts of 1881 and of 1887 contain, I have said, the fruitful germs of a happy and lasting reform in this matter; and the object of legislation should be to bring these to maturity and complete development. This consummation is at present checked by obvious and grave defects in these statutes, and by the circumstance that the national mind is in a state difficult to appease and content; and the problem is how so to recast the law, as to effect a settlement of the Irish land, reasonably just, adequate, and above all permanent, and to satisfy, within fair limits, the ideas and wants of the Irish peasantry. The plan I suggest would enlarge the scope of the Acts of 1881 and 1887, and simplify their working in essential points; but it would only boldly extend their principles; and instead of creating peasant ownership throughout Ireland by buying out landlords, it would aim at establishing generally a mode of tenure conforming to popular notions and wishes, and yet at saving, as far as was possible, legitimate existing proprietary rights, and maintaining landlords largely as a class. By the Acts of 1881 and of 1887 the immense majority of the tenants of Ireland are empowered to convert their present tenancies into terms renewable every fifteen years, but practically perpetual at State-settled rents; and in this way the estate of the landlord, though he still retains many rights of ownership, is assimilated to a reversion in fee, subject to a fee-farm rent or a permanent rent-charge. The tenant, therefore, who has recourse to the law, acquires what, to some extent, is ownership, conditional at least, and at a rent fixed by law; but, as we have seen, he can only attain this status through a somewhat costly and tedious process, involving an application to a Court of Justice; a repetition of this process is necessary, too, at intervals of time by no means distant; and, as I have said, the law is so complicated, so little understood, and so expensive, that nearly two-thirds of the tenant class in Ireland have not as yet tried to obtain its benefits, and remain under their old mode of tenure. In order to get rid of these grave obstacles, to make the law cheap and intelligible at a glance, and to effect a final and enduring settlement, I propose that, in the case of all tenancies within the Acts of 1881 and of 1887—a mere fraction is not included—the estate of the tenant

shall be at once enlarged into a perpetual interest, at a perpetual rent to be never changed, but subject to conditions nearly the same as those laid down by the existing statutes. The interest thus created should, in all respects, be assignable like a fee-simple estate, regard being of course had to the rights of the landlord; in my judgment it ought not to be defeasible by an ejectment of any kind, for I would give the landlord a different remedy, and as for the rent which, under the scheme, would be infinitely the most important matter, the existing rent should, in all instances, be presumed to be the legitimate rent; but landlord and tenant should have an equal right to appeal to the Land Commission or the County Courts, to have the rent once for all adjusted, within a period say of three years, that finality might be soon attained; and, in order that tenants of the humbler class who could not afford the charge of this process, should have the full benefit of an application of this sort, the landlord ought to be obliged to produce his rent-accounts, and from the examination of these it would be almost always possible to ascertain what was a just rent, especially if the Courts were aided, as they ought to be, by a good staff of valuers.

In this way, by a rapid process, and without litigation in most instances, the tenant class in Ireland, with but few exceptions, would practically acquire the ownership of the soil, subject only to reasonable and easy conditions, and to an unchangeable and perpetual rent, which, from the outset, would be doubtless fair, and, as time rolled on, would be probably low. This great end, however, would have been accomplished by a development only of the existing law, its imperfections having been removed, and the checks on its free working being swept away; and the settlement would be speedy and permanent. Let us next consider what would be the status of the landlord, under the proposed scheme, and what rights would be secured to him. His proprietary position, I fully admit, would be greatly, and for all time, changed; for virtually he would cease to own the land—he scarcely however owns it now; and as to all tenancies affected by this plan, his interest in the land would be very nearly reduced to that of a mere rent-charge; for there would be no periodical revision of rents; and I would not allow the tenant's estate to be capable of forfeiture in any instance. His rights, in a word, already diminished by the legislation of the last eighteen years, would be, further, and even largely, cut down; and compensation, as I shall endeavour to show, ought to be adjudged to him in the national interest, within practicable and fair limits. The position, however, of the Irish landlord would be less affected than might at first sight appear, for even now his reversionary rights cannot be deemed to be of great value; and

assuredly it would be very much better than it could be under any scheme of general expropriation, the assumed alternative. Under the plan I propose he would retain the ownership, with every inducement to continue resident, of his mansion and his demesne lands, possessions which, if he were bought out, would probably be, before long, sacrificed; as mines, minerals, woods, plantations, turf-mosses, to a certain extent, and rights of sporting and other 'royalties,' as justice demands, would be reserved to him, he would still keep rights, which would be all but lost, were Land Purchase by the State carried out; and his income, too, though it could not be increased, would probably be not much diminished, while certainly it would be a great deal more than it could be, whatever might be the equivalent for his estate he could reasonably expect. In a word he would not suffer as much, as might be imagined by unthinking people; and he would fare infinitely better, I repeat, than is possible were he sold out and compensated. The question remains how the landlord should have the rights that would be left to him completely secured, and especially the right to the perpetual rent representing the chief part of his commuted ownership. As I have said, I would not allow him to have the remedy of ejectment in any case, for it is the essence of my plan that the estate of the tenant should be indefeasible like the free fee-simple. But he should retain every other remedy to enforce his rights which he has at present, and these should be made more cheap and summary; and, in the case of the non-payment of the rent, he should have ample and easily accessible power to make the tenant a bankrupt, and to sell his estate¹, the purchase-money being charged with the arrear, and the purchaser being assured the right of obtaining, when required, possession of the land. By these means the rent, I believe, would be as safe as any other kind of property.

I only know of one solid objection that can be made to a scheme of this kind. Of the half million of tenants in Ireland about 150,000 are mere cottagers, that is possessors of little plots of land, who are scarcely able to eke out existence, even though they held altogether rent-free. Would you stereotype these miserable peasants in the soil, and practically make them owners in fee, subject only to a perpetual rent-charge? My answer is that the same difficulty would arise under a plan of State-purchase; most probably, too, these petty holdings would be gradually bought up by the larger farmers, and would disappear with the growth of prosperity; and, besides, no reform of land tenure will remove at once all that is ill in Ireland. The relief, indeed, of the 'congested districts,' in which

¹ The County Court could carry out this process at quite a trivial expense. But of course the absolute supremacy of law would have to be restored in Ireland.

these masses of poor are crowded, whether through a large system of Public Works, or by emigration conducted by the State, is a problem of great and increasing importance; but it is foreign to my immediate subject, and it is unnecessary to do more than to allude to it. Let us briefly consider what would be the practical effects of the scheme I propose. The tenant class of Ireland would not be converted into freeholders at a terminable rent; for they have no claim to a huge bribe like this, and the revolution is, I believe, impossible. But they would acquire a status infinitely better than that sought by their fairest advocates; they would be owners of the land at a permanent charge borne easily at first, and probably growing lighter; and virtually they would have become copyholders, without onerous copyhold incidents, a mode of tenure far more akin to their national and archaic usages than the absolute freehold of English ownership¹. By a change, in a word, in itself not unjust, though liberal in the extreme, for the sake of peace, and one, too, that may be pronounced feasible, they would have been made a 'proprietary,' in no doubtful sense; for, as Mill says, 'the idea of property does not necessarily imply that there shall be no rent, it merely implies that the rent should be a fixed charge,' and fair. On the other hand the landlords of Ireland would certainly have been deprived of important rights, and for this loss, they ought, I have said, to be reasonably indemnified by the State; but they would still retain many rights of property; their revenues, I believe, would not be much less than they are at present if they could not increase; they would preserve interests of the greatest value, which they could scarcely preserve under a scheme of Land Purchase; and they would still be an aristocratic order, not a discredited class deprived of their lands by a forfeiture solemnly decreed by Parliament. Their position, in short, would, beyond comparison, be better than it could be were they sold out compulsorily or generally by State-agency—very probably their only other choice; and—a national gain of great importance—they would remain in Ireland to perform the duties, political and social, which, were they removed, would be performed much worse, or even not at all. That an Irish landlord, indeed, should hesitate between expropriation and such a plan as mine, appears to me not easy to understand; and this could be explained only, I think, by supposing that many of the class have a lingering belief that general expropriation is not possible, and that the existing land

¹ The Irish tenant-farmer never thought of freehold ownership until the idea was put in his head from external agencies. Even now he very much prefers the three F's, the tenure which I propose extended to the furthest limits. Freehold ownership is an English, not an Irish, idea.

system will still continue. This idea, however, is a chimera; that land system is already doomed; and let not Irish landlords, even now compared by their enemies to the French *émigrés*, deserve the stern judgment pronounced on these men—‘they have learned, and they have forgotten nothing.’

I have now reached the difficult question of a reasonable indemnity for Irish landlords, and this, I have said, is justly their due. The Act of 1870, in my judgment, did not affect the value of Irish land, though it certainly trenched on proprietary rights; the selling price of estates, indeed, rose immediately after it had become law. But the inevitable result of the Act of 1881, independently of the depression of the times, and of the agitation of the last eight years, has been to depreciate property in Irish land; the statute violently annulled contracts, had necessarily the effect of reducing rents, and assimilated the status of the Irish landlord, in some degree, to that of a rent-charger; and the operation of the Act of 1887, going as it does so far as to break leases—contracts hitherto on the same footing as mortgages and even marriage settlements—will of course be in the same direction. The Legislature, therefore, by its deliberate act, has deprived Irish landlords of most important rights, for which compensation may be fairly claimed; and it is no argument against this to say that justice required the reform that was made, that the contracts interfered with were not fair, that the rents that were lessened were not legitimate, that the Irish landlord was only brought down to the position which he ought to have always held. The reply is conclusive: the state of things thus transformed had been for ages placed under the sanction of laws of the most solemn kind, and innumerable and vast rights of property had been created on the faith of these; and according to all European usage—as was seen even in the case of the owners of slaves—law cannot undo what law had done, to the utter wrong of those who suffer from the change. This is so evident, indeed, that Mr. Gladstone, in bringing in the measure of 1881, distinctly admitted that Irish landlords had a just claim to compensation from the State, if it could be proved that they incurred loss; and whether he is now of the same mind or not the irrevocable word cannot be forgotten. Irish landlords therefore have a fair right to indemnity, even as the law now stands; and, were anything like my scheme carried out, their title would be more assured and manifest. Assuming then that, as I propose, they were converted into mere fee-farm renters, as regards tenancies of the ordinary kind, what claim for compensation could they prefer, and what settlement could they reasonably expect? They could not make a demand in respect of losses owing to seasons and prices; but they

would have a righteous and strong case to the extent of injury actually done, through the operation of the existing law, and the extinction of their reversionary rights, which would follow, were my project adopted; and losses caused by reductions of rent, in name voluntary, but really due to the influence of the Land and the National Leagues, and to the circumstance that the Act of 1881 has generally reduced the standard of rent, ought, I think, fairly to be taken into account. The extent of the detriment, in most instances, could probably be ascertained exactly only through an appeal to a Court of Justice, but a rough measure is not impossible. The value of English estates has been lessened rather more than a fourth from natural causes; that of Irish estates has been diminished already certainly more than a half—in fact they have no place in the open market—and under my scheme it would be perhaps even more diminished. On the other hand, just as is the claim of the landlords of Ireland to compensation, a reasonable compromise in these matters, we must not forget, can alone be looked for; they need not expect and will not receive a complete indemnity as things now stand, and they should aim at obtaining not what is strictly due, but what, in view of all the facts of the case, a Legislature far from favourable to them is likely, under democratic influence, to concede.

Looking at the question, then, from this point of view, what relief can be afforded to Irish landlords? Under my scheme they would be almost deprived of the reversionary rights they still possess; and I would compensate them for these by the advance of a sum, in the nature of a fine, but not to exceed a year's or a year-and-a-half's rent. This sum might be raised by creating a stock of some kind guaranteed by the State; repayment of the advance and the interest should be secured by making the loan a charge on the landlord's and the tenant's interests, the fee-farm rent which the tenant would pay of course being *pro tanto* lessened; and as this reduction would be extremely small, the fine should be paid to the landlord directly, whether his estate was mortgaged or settled or not—in order to avoid expense and delay—unless objections were made after sufficient notice. An advance like this would be a real boon, after the trying events of the last few years, and certainly it would be amply secured; but compensation ought not to stop at this point, it should be extended to further limits. All Irish estates are subject to rents and other annual charges payable to the State, and Irish landlords may fairly claim that these outgoings should be reduced or commuted in proportion to the diminution in the value of their lands, which could be ascribed to the interference of the State, taking this term in a broad and liberal sense. This relief

would be by no means trivial, but it appears to me very far from sufficient. The immense majority of Irish estates are, to a greater or lesser extent, encumbered; the State having deliberately cut down the fund set apart to bear these charges, especially by the abolition of solemn leases, I insist that it has an equal right to deal freely with the charges themselves; and it would be surely iniquitous, in the highest degree, that if Parliament, in the public interest, should take away that which belonged to what was practically a partnership in a common estate, the whole loss should be laid on a single partner. I would certainly, after what has occurred in Ireland, interfere boldly with encumbrances on land; and I justify the suggestion on the well-known equity of making a general average in a common shipwreck. I do not, however, entirely agree with those who accept the general principle, but draw in this matter a broad distinction between mortgages and family charges, and insist that the first must be deemed inviolable, and that a reduction should only be made in the second. This distinction, though in the main well-founded, would not coincide with the real facts, or be in accord with true equity. Many arrangements, which take the form of mortgages, are really in the nature of family charges, as, for instance, a case by no means uncommon, where sisters, being parceners of land, sell their shares to the husband of another sister, and take mortgages for the purchase-money; and I might add hundreds of examples of the kind. On the other hand, many charges which might be fairly described as 'family charges,' though they do not assume the shape of mortgages, are entitled to at least equal respect; as where a younger brother assigns his portion charged on the family estate for full value, or where family charges are paid off through trust deeds or other arrangements; and here again I could multiply instances. It is obvious, therefore, that the true distinction is between charges which represent money paid actually, or its full equivalent, regard being had to present values;—constructive considerations, even that of marriage, in my judgment, should be excluded—and those which do not fulfil this description; and these, I think, might fairly be treated differently.

Bearing this distinction in mind, accordingly, I will call the first set of charges¹ 'charges for value,' and all others 'voluntary charges;' and I will consider the treatment applicable to both. The encumbrances affecting Irish land, so far as regards the rights of landlords, have been estimated at about £70,000,000; and probably 'charges for value' amount to £18,000,000, say a fourth of that

¹ The term 'charge' would include terminable charges, e.g. jointures. The term 'landlord' would include inferior landlords.

sum, 'voluntary charges' amounting to £52,000,000. Many Irish landlords propose that the State should advance, either in cash or in stock, a sum sufficient to pay off these charges, repayment being assured at a low rate of interest, and the principal and interest being extinguished, as in the case of loans under the Improvement Acts, by a series of successive yearly payments. This project, however, would pledge the credit of the State to an extent to which the general tax-payer would certainly, and I think justly, object; it will never be sanctioned by a British minister; and, besides, encumbrances on Irish land ought, in my judgment, as a matter of right, to bear a part, and not a small part, of the loss resulting from legislation and its far-reaching consequences. I suggest a scheme which would be more practicable, and consonant, I believe, with equity. The Irish Courts could easily ascertain, on petition, what the encumbrances were that burdened the estates of Irish landlords; and, this having been done, they could soon determine what reduction ought to be made from these charges, regard being had to the amount of detriment done to the market value of the landlord's property owing to the policy adopted by the State. As regards the rate of reduction I would make no distinction between 'charges for value' and 'voluntary charges,' assuming, of course, that these last were valid; but charges wholly, or in part, unsecured from want of a sufficient margin of land, should be dealt with upon a different principle, and be either compounded or allowed to perish. All this seems to involve delay, and litigation upon an immense scale; but were the duty devolved on the Land Commission, and on capable Commissioners dependent on it, the work would not be very tedious or costly—an appeal should lie, of course, to the Court of Chancery—and the process would be less open to objections of this kind than any procedure could be under a scheme of the general expropriation of Irish landlords, the alternative which must be kept in view. The scale of reduction having been fixed, and the sums fairly due having been settled, I propose that the existing charges should be extinguished, with the different rights and remedies attached; but in lieu of these the Courts should have powers to grant debentures to the persons entitled, representing the monies allotted to them, these debentures being charged on the land encumbered before by the old charges, and being mortgages to all intents and purposes, but negotiable and transferable in the easiest way, and certain therefore to pass in the open market. Here, however, I would draw a broad distinction between 'charges for value' and 'voluntary charges,' and this on obviously solid grounds. The debentures, which would be the equivalent of the first, should be guaranteed by the credit of

the State; the other debentures should be not so secured, and a guarantee to that extent only might receive, I hope, the sanction of Parliament. Until the scheme should have been worked out remedies by foreclosure, by sale, and by action on personal covenants, should be suspended; but receivers might be appointed to collect the interest due on existing charges, and arrears of interest should be taken into account in estimating the sums finally adjudged to be due. Lastly, though a scheme of this kind, I believe, would not be largely opposed in Ireland, I propose, should the owner of any charge, whether 'for value' or 'voluntary' only, object to the settlement made by the Court, he should have a right to claim such a part of the landlord's estate, that is, under my scheme, of the fee-farm rent, as the Court should consider a just equivalent. Grants of this class would be certainly few.

This plan for relieving Irish landlords is certainly not without defects: for instance, it would do something, but not much, for landlords completely free from encumbrance. This class, however, is an extremely small one; and the plan, I maintain, is perfectly just, within the limits I have laid down, and is practicable without much expense or difficulty. Let us glance for the last time at the general scheme for settling the Irish land I have briefly described. It would more than assure the tenant his rights, and would practically make him owner of his farm; it would call for sacrifices, no doubt, from the landlord, but he would be indemnified at least in part, and it would leave him in a much better position than he could be were he bought out by the State. It would do justice, also, between the landlord and those who have charges on his estate, and it could be carried out without pledging the credit of the State to any great extent, for the contingent liability of the tax-payer would not exceed, I think, £25,000,000, and this liability could scarcely arise. It would possess, in addition, the immense advantage of preserving for Ireland the landlord class—a necessary element in the national life, whatever babblers of the moment say; and, in short, compared to any expropriation scheme—and this comparison should be always made—it would be infinitely more just, more safe, less violent, and, above all, it would not be like the alternative, as I believe, impossible. In concluding this article I shall make three remarks, and these, I venture to hope, may deserve attention. To the success of the project I have sketched, or to any plan for settling the Irish Land Question, it is necessary that order shall be restored in Ireland and that law shall be generally obeyed. I assume this as a *sine quâ non*, but it does not fall in with my present purpose to speculate how this shall be accomplished. I shall merely remark that the scheme I suggest

would, I believe, do much to attain that end, and certainly would do more than any plan of general expropriation and Land Purchase. Again, the reform of which I have traced the outline should be the type of the Irish Land System and the general plan of land tenure ; but facilities might be reasonably given to Irish landlords to sell their interests to tenants or in the general market. Lord Ashbourne's Act, in some respects modified and enlarged, ought to suffice for this ; but the process should be made slow and tentative, and care should be taken that the annual charge payable under it by purchasing tenants should be nearly equal to the fee-farm rents secured to the landlords under my project. Lastly, I am aware that the settlement I propose is not in accord with current English opinion, which, vague, ill-informed, and fluctuating as it is, seems to incline to an heroic experiment of generally expropriating Irish landlords, without counting the results or the cost. English¹ opinion, or what is called by that name, is, however, an unsafe guide in this matter : the Irish land is unhappily strewn with monuments of English misdeeds and errors, and in our time the Encumbered Estates Act, propounded by English thinkers and statesmen as the saving health of the Irish Land System, has proved an instrument of confiscation, immense and unjust, and a lamentable and complete failure. One who has studied the subject may, in these circumstances, refuse to accept dogmas in the main English ; and may fairly propose a plan of his own, for the settlement of the Land System of Ireland, in his opinion very much better than the ill-considered schemes at this moment popular².

WILLIAM O'CONNOR MORRIS.

¹ English opinion has, in my time, run violently in favour of no less than four conflicting policies about Irish land. From 1847 to 1850 it preached the wholesale eviction of Irish tenants. It then clamoured for the wholesale eviction of landlords through the Encumbered Estates Court. Next it welcomed with delight the Gladstonian compromises of 1870 and 1881. With equal knowledge and steadiness it is now leaning towards the general expropriation of Irish landlords, provided always that the British tax-payer shall run no risk. The first two policies have proved wretched failures ; the third is now condemned ; ought not this to suggest doubts as to the wisdom of the fourth ?

² This article was written some months before the appearance of the remarkable letter of Mr. Bright to Lord Kilmorey on the Irish land. It is truly gratifying to me to find that my views coincide in principle with those of a statesman preeminently a sound authority on the Irish Question. I have differed slightly from Mr. Bright in details, perhaps because I am acquainted with the defects in the working of the Act of 1881, a special kind of knowledge which Mr. Bright cannot be supposed to possess.

THE BEATITUDE OF SEISIN. I.

THE subject of this essay is an episode in the history of English law, which has hardly received all the attention that it deserves. It is in itself curious and interesting, and a full understanding of it might lead to the understanding of some other passages in our legal history, which are not very intelligible. It concerns the protection which our law of the middle ages cast over seisin, and more especially the protection of seisin against proprietary right.

Now a doctrine of possession and a system of possessory remedies seem to find their most critical test in the question—How, and in what circumstances, is possession protected against ownership? It may well be, as some think, that to protect possession against ownership has not been the object of those by whom possessory remedies have been instituted and developed. In protecting possession they may have had chiefly in their view possession by those who have right; they may have wished to facilitate proof in favour of owners; and it may have been but an accident in their schemes, though an inevitable accident, that they were forced to maintain the sanctity of possession even against ownership. But though this may be so, still it is hard to determine whether, or in what sense, a remedy is 'possessory,' until we have seen it conceded or denied in cases in which it would act as a limit to proprietary rights. When the contest is merely between a possessor and one who claims no right in the thing, then it is often possible to dispose of the question by saying that 'possession is evidence of ownership,' or again, to contend that possession engenders title of a sort—title good against all who have no better, because older, title. When however we see the possessor protected against one who admittedly is the owner, or against one who is ready and willing to prove his ownership, then we know for certain that possession itself is protected by law, and protected for its own sake. By this phrase, 'for its own sake,' I mean not to stir any question about the ultimate reason for protecting possession, but only to point out that when we see an owner succumbing to a possessor, forced to deliver up what is his own, or forced to pay damages for having touched what is his own, then there can be no doubt that the law really does protect possession, and does not merely regard it as affording evidence of title, or as giving a title good against those who have no better. Thus it becomes an important inquiry as

regards any system of law, whether and how the rights of owners are limited by the rights of possessors. To such an inquiry let us subject our medieval law.

Looking then at the state of affairs at the end of the middle ages,—the accession of Henry VII will be a good moment to fix, and we can turn to Littleton's Tenures as to a very recent book,—we may be inclined to think for one moment that the common law (as distinct from statute law of no great antiquity) never protects either the old-fashioned seisin or the more modern 'possession' against ownership, against the entry and even the forcible entry of 'him that right hath.' The statutes to which reference has just been made are of course the Statutes of Forcible Entry, of which the earliest is no older than 1381¹, and of which for the present we will take no further notice. It has been the general opinion that nothing but those statutes stood in the way of a forcible entry on the part of one who had a right to enter. But then stress must be laid on the phrase 'a right to enter': it at once reminds us that a person might well be owner of land and as such be entitled to be seised and possessed of it, and yet might have no right whatever to enter upon it. The methods whereby this state of things might be brought about were those which we are wont to group under the two heads of Descent Cast and Discontinuance. To put the matter very briefly:—If a disseisor (or the alienee of a disseisor) died seised and the ousted owner had not by continual claim kept alive his right to enter, then he could not enter upon the heir of him who had thus died seised; 'the descent cast had tolled his entry,' his entry was no longer *congeable*. Then, again, if an abbot seised in right of his monastery, a husband seised in right of his wife, or a tenant in tail made a feoffment in fee simple, this was a discontinuance, and the successor, wife, issue, might not enter on the feoffee. In these scattered cases, which we need not at this moment define more accurately, seisin was protected against ownership; and very effectually protected; the true owner, the person who of all the world had the best right to be possessing the land, might not set foot upon it.

We can hardly think of these rules otherwise than as rules which exist for the protection of seisin,—not indeed of every seisin, or even of every seisin that has colour of title, but of seisin acquired under certain particular titles. But the scope of these rules is so narrow and (as it must seem to us) so capriciously defined, that we have great difficulty in conceiving them as forming part of a rational coherent theory of possession; we are tempted to pronounce them quite unintelligible, and therefore presumably

¹ 5 Ric. II. Stat. 1. c. 7.

'feudal.' The explanation which I shall here hazard is that they are the last relics, somewhat casually preserved, of a coherent theory of possession, of an extremely rigorous prohibition of self-help, of a system of possessory remedies which was once a simple and effective system, but which fell to pieces in the course of the fourteenth century. The main outline of this historical explanation is suggested by a passage in Coke upon Littleton¹; but to fill up some part of that outline seems a reasonable purpose; for really the treatment of seisin in our oldest common law must be understood if ever we are to use the vast store of valuable knowledge that lies buried in the Plea Rolls and the Year Books. If we were free to write history out of our own heads, it would be a plausible doctrine that gradually and steadily the right of a dispossessed owner to right himself, to take what is his own, is curtailed by law; that in the law of the later middle ages, the law of Littleton's time, we may see the first tentative and clumsy advances towards a protection of possession against ownership. But such a doctrine would be quite untrue; the sphere allowed to self-help by the law of the twelfth century is almost infinitely narrower than that allowed by the common law of the fifteenth. This seems to me an important fact, and I shall here attempt to collect some proofs of it.

We have every reason to believe that our possessory actions, the three assizes of novel disseisin, mort d'ancestor and darrein presentment, were not developed out of ancient folk-law but were of positive institution, that they were established by ordinance early in the reign of Henry the Second. Their very name 'assizes,' the express testimony of Glanvill² and Bracton³, to say nothing of later tradition⁴, the equally clear testimony of the Norman books as to the origin of the Norman assizes⁵, all point the same way, and it is even possible that we have 'the text of the law on which the assize of mort d'ancestor was founded⁶.' We may add to this that a definitely possessory remedy does not seem native to the law of our race; that when it appears in England or in Germany or in France, it bears witness to the influence of alien jurisprudence, of Roman law working either directly, or through the medium of the Canon Law. At the same time we must not think of the Norman or the English assizes as copies of the interdicts or of the *actio spolii*. It would be easy for us to exaggerate the amount of Roman law that can have been known in the court of Henry the Second.

¹ Co. Lit. 237.

² Bract. f. 164 b.

³ Brunner, *Entstehung der Schwurgerichte*, pp. 297-303.

⁴ Stubbs, *Const. Hist.* § 145; *Assize of Northampton*, c. 4. Madox (*Hist. Exch.* vol. ii. p. 549) gives from a roll of 14 Hen. II. an entry to the effect that Ralf son of Huilard was amerced for a disseisin done against the king's assize. The assize of novel disseisin seems therefore to have been in force as early as 1168.

⁵ Glanvill, xiii. c. 1.

⁶ Mirror, c. ii. § 25; 2 Inst. 24.

Much more had become known by Bracton's time; but Bracton had great difficulty in finding the assizes in the Roman books¹. They were not pedantries, but lively, effective institutions, well suited to the Normandy and the England of Henry's day, and they struck deep root and flourished. A century after Henry's death the Novel Disseisin was still '*festinum remedium*,' the most summary proceeding known to the Chancery².

If we ask for the motive of this new institution, we ought perhaps to distinguish between motives which are and those which are not avowed. Henry's main object may have been to strike a heavy blow at feudalism, to starve the feudal courts, to weaken the tie between man and lord, to strengthen the tie between subject and king, to make every possessor feel that he owed the blessedness of possession to a royal ordinance, to the action of a royal court. Also it is not to be disguised that he made money out of his assizes³. But he could not have succeeded had there not been a strong feeling that a possessory action was a right and good thing, that the peace ought to be maintained, that proof should be easier, that the dilatory processes of the old actions were working injustice. The avowed motive for the new institution was, at least according to Norman tradition, the protection of the weak against the mighty, the poor against the rich; along with this we have the homely thought, that the plough must not be disturbed, that he who sows should also reap⁴. Perhaps at the base of the new remedies there was no one clearly thought-out principle, but rather several different ideas, which, though for a while blent and harmonious, would in course of time become separate and discordant.

Of all the possessory assizes the Novel Disseisin is by far the most interesting; and since everything depends upon the words of its formula, that formula, the question which the recognitors were summoned to answer, must here be set forth:—

Si *B* injuste et sine iudicio disseisivit *A* de libero tenemento suo in *X* post [ultimam transfretationem domini Regis in Normanniam—or other the time of limitation].

¹ Item est '*petitoria haereditatis actio*' [this means the writ of right], et competit illis, quibus ius merum descendit ab antecessoribus sicut haeredibus propinquieribus. '*Possessoria*' vero '*haereditatis petitio*' est de possessione propria, et quae dicitur '*actio unde vi*,' per quam restituitur spoliato, et dici poterit '*assisa novae disseisinae*.' Item dicitur '*possessoria petitio*' de possessione aliena, sicut alionjus antecessoris de aliquo tenemento de quo antecessor obiit seisitus ut de feodo, quae dicitur '*actio quorum bonorum*,' sive '*assisa mortis antecessoris*.' . . . Est etiam interdictum sive actio '*quorum bonorum*,' quae non oritur ex maleficio sed ex quasi contractu. Bract. f. 103 b, 104. These are learned after-thoughts. We do not suppose that the appeal of homicide was modelled on an '*actio legis Aquiliae* de hominibus per feloniam occisis.'

² Stat. West. II. c. 25.

³ Bigelow, *History of Procedure*, p. 187.

⁴ Brunner, pp. 297-300, 328-330; see the *Statuta et Consuetudines* published by Warnkönig at the end of the second volume of his *Französische Staats- und Rechtsgeschichte*, especially p. 11.

Glanvill speaks but very briefly of this assize, and gives us no information as to the precise meaning of the terms used in its formula¹. Again, Palgrave's '*Rotuli Curiae Regis*' give us but little help. We may indeed see that in Richard's reign and John's the new remedy had become very popular; it was doing a great work. But just because it was working well, the records of its working are uninformative. In case after case there is no pleading at all, and the jurors answer the question put to them with almost monosyllabic brevity—'*disseisivit eum*'—'*non disseisivit eum*'; they well understand what is meant and do not pray the aid of the justices. During Henry the Third's reign special pleas (*exceptiones*) become not very uncommon, and special verdicts become still commoner. The ideas answering to the terms '*injuste*,' '*disseisivit*,' '*libero tenemento*' are being developed and defined, and it is becoming rather rash for laymen, over whose heads an attainder is pending, to swear that *B* has unjustly disseised *A* of his free tenement. Then from the middle of the thirteenth century we have Bracton's book with an elaborate doctrine about the scope of the assize.

Before we turn to that account it will be well to remember how summary an action this Novel Disseisin was, how sharp was the contrast between it and other actions². To begin with, '*personal service*' (to use a modern term) was unnecessary; to attach the defendant's bailiff was enough; there could be no *essoins*; there could be no vouching to warranty of any one not named in the writ; the assize could be taken by default; no pleading to issue was necessary; the question for the recognitors was defined in the writ. Lastly, this was the only action in which one could recover both land and damages. It is not, in Bracton's view, a real action; it is a personal action founded on tort³.

Now in order that we may understand the spirit of this assize as administered in Bracton's day, we had better at once put the extreme case, which is also the simplest case:—*A* is the true owner, or very tenant in fee simple, of land and is seised of it; he lives on it and cultivates it himself; there comes one *B* who has no right whatever; he casts *A* out and keeps him out, by force and arms. When, we must ask, does *A* cease to be seised and when does *B* begin to be seised? Doubtless in one sense or for one purpose, *A* is disseised so soon as he is put off the land; he can at once complain to a court of law that *B* has disseised him. Indeed to found such a complaint no actual ouster was necessary; had he repulsed *B* he might still have complained

¹ Glanv. xiii. 32-9.

² Compare 2 Inst. 411; 8 Rep. 50.

³ Bract. f. 104, 164 b.

of a disseisin. The assize serves the purpose of an interdict for retaining, as well as that of an interdict for recovering possession; had *B* but entered with an intent to assume possession this would have been disseisin enough. In many cases the mere troubling of possession is a sufficient disseisin, if the person seised choose to complain of it as such ¹. But even when *A* has been extruded from the land, *B* is not at once seised (at least as regards *A*), that is to say, he is not protected by the assize (at least as against *A*); if within a certain limited time *A* returns and ejects *B*, *B* will have no ground of complaint. Bracton sometimes expresses this principle in a romanesque form, derived from what is now held to be a misinterpretation of a famous sentence in the Digest ²; one can retain possession *animo solo*. The ejected *A* so soon as he has been *de facto* ejected has ceased to possess *corpore*, but he has not ceased to possess *animo*; he has lost *possessio naturalis*, he has not lost *possessio civilis*. When however we come to ask what this really means, we find that the talk about a man retaining seisin *animo solo*—apart from any objection about the misuse of Roman terms—is somewhat misleading. Really there seems to be a set of hard and fast rules about the matter. *A* must turn *B* out within four days; otherwise *B* will have a seisin protected by the assize. Such is the case if *A* was actually on the land and was himself cast out. If however he was away from the land when the disseisin took place, then a longer time will be allowed him. In the first place, he will not be disseised until the act of disseisin is brought to his knowledge. In the second place, he will then have a reasonable time within which to come to the land, and after that he will have his four days. The ‘reasonable’ time is in several cases determined by the parallel rules about *essoins*. Thus the man who is in Gascony or on a pilgrimage to Compostella has forty days, two floods and an ebb, fifteen days and then the four days. Bracton, if I understand him rightly, seems to think that for a man in England fifteen days would always be reasonable, but says that at the present time this rule is not observed. The four days he tells us are allowed a man for the purpose of collecting friends and arms ³. Fleta ⁴ and Britton ⁵ repeat, though not very clearly, this curious doctrine; four days seems still the fixed time within which a person who has himself been cast out of the land may lawfully enter upon and eject his ejector.

Mr. Nichols in his fine edition of Britton has supplied a gloss

¹ Bract. f. 161 b, 216 b.

² Dig. de diversis regulis juris (50. 17), 153. Ut igitur nulla possessio acquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est. See Bract. f. 38 b, 39.

³ Bract. f. 163.

⁴ Fleta, p. 216.

⁵ Brit. vol. i. p. 294.

from a Cambridge MS., which there is some reason for attributing to John of Longueville, a justice of Edward the Second's time¹. The first words of it are very interesting :—'Where the disseisin is done in the presence of the disseisee, the disseisor must be ejected within five days ; because the law of ancient time granted that the disseisee should go one day to the east, the second day to the west, the third day to the south, and the fourth day to the north, to seek succour of his friends all the country round.' This same MS. contains a Bracton as well as a Britton, and in the margin of the Bracton I have found a Latin note, to the following effect :—'A being at London is disseised of his free tenement in York, for his family is ejected ; if it be asked within how long a time he may lawfully re-eject his ejector by his own force, I am safe in saying (*dico secure*), within fourteen days, or fifteen ; for in five days a messenger may come from York to London to give him notice ; then A himself can go thither in other five days, and four days being spent in obtaining the aid of friends, he can re-eject the ejector on the fifth. And so wheresoever he be, by computing the days reasonably necessary for coming and going (the allowance being more or less liberal according to the discretion of the justices) and four days for getting the help of friends, one can decide whether time has run against him or no².' It would seem then that in the opinion of some lawyer of the fourteenth century this rule about the four days was still law. We shall have some difficulty in reconciling this with the testimony of the Year Books ; but we know how legal texts are haunted by the ghosts of dead doctrines.

If a somewhat close attention is paid to Bracton's words, we shall find that a period of four days is mentioned more than once in connexion with the acquisition of seisin ; some attention is necessary, because, as it seems to me, he was inclined to speak vaguely of it and to rationalize it away. Thus if A, who has been ejected, die without having purchased a writ, his heir will not have the mort d'ancestor against the ejector, unless A die within four days after the ejectment³. If he die within the four days then he 'dies seised' within the meaning of the writ of mort d'ancestor⁴. Again, a case is put in which I enfeoff you to the intent that you marry my daughter ; you marry some one else ; I may eject you, but must do so *infra triduum vel quartum diem, vel aliquantulum ulterius, sed cum causa*. Seemingly this means that I must enter within four days, but that a longer time will be allowed me if there be cause, if e.g. I am not on the spot⁵. Then, again, Bracton considers personal liberty and personal villeinage as the

¹ Brit. vol. i. p. 294.

² Bract. f. 218 b.

³ MS. Dd. vii. 6, at f. 34 d of the Bracton.

⁴ Bract. f. 262.

⁵ Bract. f. 23.

subjects of a sort of possession or seisin. A runaway serf must be captured *infra tertium vel quartum diem*, otherwise he will be *in possessione libertatis*, will be *statu liber*, and the lord will be put to his action¹. This term of four days must be carefully distinguished from the term of year and day, by dwelling for which in a privileged place a villein may gain the right of liberty. It will take him a year to gain a right to his freedom; but in four days he may get possession, legally protected possession, of it.

A term of four days seems therefore the time during which one who has ousted the owner must *de facto* hold the land in order that he may have a seisin of it, legally protected against the owner. On the other hand, if one comes to the land by good title, no lapse of time is necessary; the feoffee is seised so soon as the feoffor has delivered seisin. But even within the region of conveyance, we in one case meet with a requirement of a four days' seisin. If a man is going to enter religion and to endow the religious house with his land, he must deliver seisin *per tres dies vel quatuor* before he becomes professed². Bracton speaks rather casually about this point, and it would be rash to lay much stress upon what he says; but it deserves remark that we here come across something not unlike the 'sessio triduana' of German medieval law.

In certain cases, German law of Bracton's time required of a man that he should remain in a very actual and obvious possession of land—should steadily sit upon the land—for three days and three nights. In what cases and to produce what legal results this was required, have been controverted questions. At one time it was maintained that the purchaser of land would not have acquired a legally protected possession, until he had held the land for the three days³. Recent writers have come to a different opinion. The commonest of all the 'common assurances' of Germany was the 'Auflassung,' a proceeding closely akin to our own Fines and Recoveries. It took the form of a fictitious action between seller and buyer, in which the land was adjudged to the latter. Having been put into possession, it seems to have been required of him that he should abide on the land three days and three nights. The object however of this requirement, according to modern authorities, was not the acquisition of a legally protected seisin, but rather the preclusion of any claim on the part of the seller or of any one else who was present in court when the Auflassung was made⁴. The origin of this period of three days, it is said, was this:—In old times a Ding ('a judicial session,' I suppose we must say, unless we

¹ Bract. f. 6 b.

² Bract. f. 27 b. See also Y. B., 20 & 21 Edward I. pp. 8, 82.

³ Albrecht, Gewere, pp. 75-78.

⁴ Laband, Vermögensrechtliche Klagen, pp. 236-244; Heusler, Gewere, pp. 167-172.

prefer 'a moot') lasted three days, and the person who acquired land by a judgment was not safe until the Ding was over, until court and suitors were dispersed¹. So the English suitor must await his adversary four days in court. I know not whether the rule that we find in Bracton that a disseisor may be ejected *infra quantum diem* has any direct connexion with the German rule; very possibly not, for I believe that in Germany the disseisee would have been allowed at least a year and day for the re-ejection of his disseisor. But Bracton's rule has all the appearance of being very ancient. We may perhaps detect its origin in yet older law. In the *Lex Salica* it makes a great difference to the man who is following the trail of stolen cattle, whether he comes upon them before or after three nights have elapsed. On this depends, what is all important in ancient law, the burden, or rather the benefit of the proof². The idea at the base of this distinction seems to be that after three nights a theft is no longer flagrant; the malefactor will not be caught in the act. It is not impossible that in the *Judicia Civitatis Londoniae*, the statutes of the London peace-guild, which seemingly belong to the reign of Athelstan, we may find a trace of the same idea. He whose cattle have strayed must announce the loss to his neighbours 'infra tres noctes,' otherwise the guild will not make good the loss³. So in the law of Bracton's day a disseisin ceases to be flagrant 'infra quantum diem.' A curious confirmation of this rule, and of the fact that before the end of the thirteenth century it was no longer observed, occurs in *The Mirror*. The writer, who is a conservative and an antiquary, complains that 'force holds in disseisins after the third day of peaceable seisin.' This, he says, is an abuse, 'forasmuch as he is not worthy of the law's help who contemns judgement and uses force⁴.'

But be the origin of the rule about the four days what it may, this allowance of a certain time for re-ejection becomes of considerable importance. That there should be some such allowance, more or less precisely defined, is of course, according to our modern ideas, very natural, especially if there is to be a possessorium so strict that it will protect even a vicious possession against the self-help of the owner. The disseisor who has forcibly turned the owner out, or who has come upon the land during the owner's absence, cannot be protected directly he is the only person on the land, at all events he cannot be protected against the owner. 'A mere trespasser,' says modern authority, 'cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by

¹ Sohm, *Altdeutsche Reichs- und Gerichtsverfassung*, p. 365.

² *L. Sal.* 37. *Essays in A.-S. Law*, p. 210.

³ *Æthelst.* vi. 8. §§ 7, 8. *Essays in A.-S. Law*, p. 206.

⁴ *Mirror*, *Abuses of the Common Law*, No. 4.

possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in possession¹. It was held in the case just cited that a trespasser who had been occupying a house for eleven days had not acquired 'what the law understands by possession.' A trespasser, it is said, 'does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner².' The writer who says this thinks also that until there has been something like acquiescence on the part of the rightful owner, the trespasser who is on the land will have no possession legally protected even against outsiders, supervening trespassers. This, for anything that I know, may be the modern law. If so, any one who now wishes to make a theory of possession has an easier task than that which was set before Bracton; for clearly it was law in his day that in the very moment of the ejectment the wrongful ejector gained a seisin protected against persons in general³. To account for this out of the theoretic materials ready to his hand was difficult. He had to hold that a man may be seised as regards some, not seised as regards others, and to speak of the disseisor obtaining a *naturalis possessio* which is protected against those who have no right, before he acquires the *civilis possessio* which is protected even against those who have right.

However, the main point which needs attention is this, that when once the short period of four days (or it may be a little longer) has elapsed, the disseisor has acquired a seisin which is protected against all men. If ejected even by the rightful owner, he will have the assize and he will be reinstated in his possession. If we are to use the terms of later law, we must say that the disseisee's entry is already tolled. There is no need for any descent cast, there is no need for any alienation by the disseisor to a third person, there is no need for any such lapse of time as can have (at least to our minds) a prescriptive effect: all that is needful is that the disseisor shall have really obtained possession of the land, and that he has done so is sufficiently manifested if he has remained undisturbed for four days, the disseisee being in the neighbourhood and cognizant of the disseisin.

But what a most rigorous possessorium have we here! It protects even a 'vicious' possession. If *A*, having been cast out by *B*, lets four days elapse, and then has recourse to self-help, *B* will bring the assize against him, and it will be useless for *A* to except that *B* obtained his possession by force, and by force used against him, *A*. This extreme rigour is so remarkable and yet has so

¹ *Browne v. Dawson* (1840), 12 A. & E. 624, 629; 10 L. J., Q. B. 7.

² Pollock, *Torts*, p. 312.

³ Bract. f. 209 b.

seldom been remarked, that were not Bracton's text very clear I should doubt whether I had understood it; but I think that if others will read the whole book on the Novel Disseisin they will come to the conclusion that has here been stated. It is necessary to read the whole book, because Bracton has a way of speaking about time which is very apt to lead modern readers astray. He constantly speaks as though lapse of time were necessary in order to give the disseisor a seisin protected against the true owner:—he must have time on his side, a long time, a long interval, a long and peaceable seisin; and again, the true owner loses the right of self-help when he has ceased to have the mind to possess, when he has dissimulated the injury, when he has acquiesced. The truth that such words as 'long' and 'short' are very vague words will be forcibly brought home to us when we discover that by 'a long time' in this context Bracton means four days.

Distinct from the case of the disseisor is that of the intruder, of one who enters on a vacant possession, on a possession, for example, left vacant by the death of a tenant for life. He may be ejected *antequam habuerit longum tempus et pacificum*; but then this *longum tempus* is to our minds not very long; it is but year and day—at least such is one opinion¹. Britton remarks that an intruder ejected by the true heir within year and day cannot recover his possession. To this the Cambridge glossator objects, 'because it seemeth to me that an intruder should not be in a worse condition than a disseisor would be²;' a remark which shows once more that, in his opinion, a disseisor would gain protection in less than a year. Probably the explanation for this seeming favour shown to a disseisor as contrasted with an intruder, is that (albeit a disseisin is a much more serious injury than an intrusion) the person who is really entitled to be in possession is much more likely to get speedy notice of a disseisin than of an intrusion; he may well not know that a right to enter has accrued to him until the intruder has been upon the land for some months.

Bracton of course has no doctrine about discontinuances or descents cast. He has no need of any, because he has a comprehensive doctrine of possession. Even the disseisor himself in a very short time, at least in what seems to us a very short time, will have a seisin protected against the disseisee, and as to alienees of the disseisor, or disseisors of the disseisor, the question whether the original disseisee may eject them will be the question whether he has stood by for four days since the original disseisin.

All this seems to me so plainly written on page after page of Bracton's book, that I should have said that there could be no doubt

¹ Bract. f. 160 b, 161.

² Brit. vol. ii. p. 288.

about it whatever, were it not that Mr. Justice Holmes has written something which seems to contradict it. 'English law,' he says, 'has always had the good sense to allow title to be pleaded in defence to a possessory action. In the assize of novel of disseisin, which was a true possessory action, the defendant could always rely on his title¹.' Now in a certain sense, though not as it seems to me a very precise sense, this is true of days much later than Bracton's, and very possibly the word 'always' was not intended to comprehend so remote a time as the thirteenth century; but as some of the many readers of one of the best of books may suppose that this sentence refers to the law of Bracton's time, I am bound to controvert it, and that too in Bracton's own words.

In the following passage we have perhaps his fullest statement of the principle that possession is to be protected even against ownership:—

Si autem verus possessor negligens erit post disseisinam, et negligens impetrator, patiens et dissimulans injuriam, impotens omnino, vel de potentia sua desperans, ut praedictum est, ita quod utramque amisit possessionem, naturalem videlicet et civilem, non succurritur ei nisi per assisam. Et si forte assisam contemnat, et possessionem suam (viribus utens non judicio) sibi usurpare praesumat, *competit spoliatori propter usurpationem assisa*, non quia 'injuste' disseisitus sit, sed quia 'sine judicio,' et quia per negligentiam veri domini utramque habere incepit possessionem, naturalem videlicet et civilem. Et si verus dominus habere velit regressum, vix aut nunquam audietur, nisi tantum super proprietate; si autem velit ad assisam recurrere, quae ei primo competeat, non poterit: quia assisam demeruit et gratiam juris, et quia frustra legis auxilium invocat qui in legem committit⁴.

Bracton afterwards treats at very great length the possible pleas in bar to the assize. The defendant can only prevent the assize being taken by excepting to some of the words of the writ. The writ inquired 'whether *B* unjustly and without a judgment disseised *A* of his free tenement in *X*.' If it was found that *B* had done this, then *A* recovered his seisin. Now there may seem to us to be two terms in the writ which might be attacked by the true owner who, after some delay, had ejected his disseisor. He might plead that what he did was not done 'unjustly,' or again he might plead that the tenement from which *A* was ejected was not *A*'s free tenement. At either point however the law of Bracton's day would meet him and defeat him. As to the 'unjustly,' Bracton almost explains this word away by saying that every disseisin done 'without a judgment' is done 'unjustly,' *injuste quia sine judicio*; the only force of

¹ The Common Law, p. 210.

² Bract. f. 163 b.

the word seems this, that a disseisin may be unjust even when there has been a judgment.

Quamvis verus dominus jus habeat in re et 'juste' ejiciat, tamen 'injuste' ejicit, quia 'sine judicio,' et quia propriis viribus reposcit quod per judicem [*corr.* judicium] reposcere debuit, *ideo per judicium restituat quod sibi sine judicio viribus usurpavit*; nunquam postmodum, nisi vix tantum super proprietate, erit audiendus; et hoc si post tempus ejiciatur quod sufficere possit pro titulo ad hoc quod sine brevi non teneatur tenens respondere; secus autem esset si incontinenti rejiciat disseisitorem¹.

It would be difficult to say in plainer language than this that the true owner, despite his title, may be compelled by a court of law to yield possession to a disseisor. Then as to the term 'freehold' or 'free tenement' in the writ. It is competent for the defendant to except that the plaintiff was not seised of a free tenement, and in this form divers objections can be made. It may be asserted that the tenement was held of the defendant in villeinage, it may be asserted that the plaintiff was merely in as bailiff or as termor. Such pleas as these are beside our point. But suppose that *B* with no sort of title but his own strong arm put *A* out of the land, and that *A* let some time go by without doing anything, but then returned and cast *B* out; *A* has disseised *B* of *B*'s free tenement; and the Court not heeding, not permitting any talk about ownership, will put *B* back again.

In hoc autem quod dicitur in brevi 'de libero tenemento' competit exceptio tenenti contra quaerentem; sed ad omnes non pertinet exceptio, quia licet 'juste' ejicere possunt, tamen non possunt 'sine judicio,' licet jus habeant ejiciendi. Jus tamen habet recenter, post tempus autem nequaquam; unde si verus dominus allegaverit quod 'juste,' replicari poterit quod 'injuste' quia 'sine judicio.' Et unde si verus dominus excipiat quod jus habeat et liberum tenementum, et 'injuste et sine judicio' ejectus sit, et quod quaerens qui injuste ejecit feodum et liberum tenementum habere non possit, replicare poterit de tempore, quod verus dominus liberum tenementum amisit, per cursum temporis, per patientiam sive negligentiam vel per impotentiam. Patientia enim longa trahitur ad consensum, et negligentia sive dissimulatio obolent injuriam. Et unde disseisitor cum tempus habeat pro se et quasi liberum tenementum, sine brevi et sine judicio disseisiri non potest. Et unde si fuerit sine judicio disseisitus et portaverit assisam, non obstat ei quod liberum tenementum non habuit quaerens, propter usurpationem sine judicio quantum ad verum dominum, et propter tempus quantum ad disseisitum².

It must certainly be admitted—or rather let us particularly observe—that Bracton does here and elsewhere account for the law's

¹ Bract. f. 205.

² Bract. f. 209 b.

protection of the disseisor partly at least by referring to the disseisee's delay; he has acquiesced, he has dissimulated, he has been negligent—this very probably is an important moment in the history of our possessory actions; but of the owner's being able to rely on his ownership there is no talk. On the next page we have these conclusive sentences:—

Videamus quae poena teneat eos qui seisinam suam in causa spoliationis [*corr.* teneat eos in causa spoliationis qui seisinam suam] post tempus viribus usurpaverint: *intrusor vel disseisor erit restituendus non obstante aliqua exceptione proprietatis.* Et si obstare non debeat exceptio proprietatis in persona veri domini, ut si dicat 'Juste disseisivi vos, quia tenementum meum est et ego dominus, et tu nullum liberum tenementum habere potes quia non habes ingressionem nisi per intrusionem vel disseisinam,' ita exceptio non valebit ei, quamvis 'juste' se ponat in seisinam quantum ad jus, 'injuste' tamen hoc facit quia 'sine judicio,' ut supra dictum est. Prius enim cognoscendum est de vi quam de ipsa proprietate.

An examination of the records of Bracton's time will I believe fully bear out his doctrine. But still I think we can see both in them and in Bracton's own pages a certain growing doubt as to whether 'seisin of free tenement' does not imply title, not of course good title, but title good or bad. He occasionally hesitates about saying that the disseisor acquires 'liberum tenementum,' and allows him only 'quasi liberum tenementum'; and he is inclined to base the requirement of 'tempus' on the necessity for some acquiescence, or negligence, or dissimulation on the part of the disseisee. Seemingly it was a further reflection upon and development of this idea of 'liberum tenementum,' which set at work that great change which makes the law as it is in Littleton so very different from the law as it is in Bracton. Very probably these words in the writ—'de libero tenemento suo'—were originally intended merely as a denial of the assize to the tenant in villeinage; the obvious, primary opposite to 'liberum tenementum' is 'villanum tenementum.' To have given every villein a possessory remedy in the king's own court would have been too daring an infringement of the manorial system even for Henry the Second; to give such a remedy to every possessor of land not burdened with villein services was a sufficiently high-handed invasion of the first principle of feudalism. But in course of time new contrasts are found for the 'liberum tenementum.' The assize is denied to the termor; according to Bracton because he holds merely on behalf of his land-lord; tenet nomine alieno; so the termor has no free tenement. Then there slowly creeps in the idea of 'an estate of freehold'; 'freehold' begins to imply a certain kind of proprietary right. Parallel with

this process is the growth of special pleading. In Henry the Third's reign pleas in bar of the assize are becoming frequent. Even if we regard the assize as still in the very strictest sense a possessory remedy, such pleas have their proper place. The defendant's view is that he has committed no disseisin, that he has ejected nobody, that he obtained his possession under some judgment, fine, feoffment, covenant; he specially pleads this matter, because he is naturally anxious that delicate questions of law shall not be left in a lump to a dozen laymen. Such pleas go to the question of possession and dispossession, and I have seen no instance of a plea which, admitting the disturbance of a settled possession, justifies that disturbance as an exercise of proprietary right. But still the development of pleading begins (in a manner which should be familiar to us) to turn matter of fact into matter of law.

But not to anticipate what must come before us hereafter as belonging to a later age, Bracton's doctrine as to the scope of the assize seems in brief this:—it protects possession, untitled possession, even 'vicious possession.' As to this last point, he expressly accepts the words of the Institutes which describe the scope of the *interdictum unde vi* as it was in Justinian's day. If *O*, the owner, turns *P*, the possessor, out, *P* will recover his possession even though he obtained that possession from *O vi vel clam vel precario*. A wrongful ejector however does not acquire possession directly he is the one person on the land, or rather he does not at once acquire possession as against the owner whom he has ejected. Such an ejector will at once be protected against mere outsiders, but he will not be protected against the owner until some days, or it may be months, have elapsed. How to account by a rational theory for this state of things is the difficulty. Bracton is unfortunately, but very pardonably, misled into supposing that according to Roman theory a person who has ceased to possess corpore can go on possessing *animo solo*. This brings him to lay stress upon acquiescence, to speak as though it were the owner's acquiescence (for four days or so) that gives the ejector a claim to protection, as though this acquiescence were equivalent to 'title,' or were itself a sort of title. It is but a short though an important step forwards from this position to say that what the law protects is not possession, but titled possession, to hold that the 'seisin of freehold' which the plaintiff in an assize must prove, is seisin acquired by some lawful title, some act in the law, or else seisin fortified by lapse of time.

Dr. Heusler, to whose excellent account of Bracton's theory of possession¹ I owe whatever is good in this paper, says that the

¹ *Die Gewere*, B. 3. c. 3.

assize of novel disseisin gradually becomes a sort of Publiciana, and that in Britton's book the process is complete, 'die Besitzklage ist eine förmliche Publiciana.' We do not, as it seems to me, find much change in the actual rules of law as we pass from Bracton to Britton; we still hear, though somewhat indistinctly, of the four days; but there is a change of theory. In great part this is just a change from clear thought to muddled thought. The grip of possession which a few years ago seemed so assured has been relaxed. By his definition Britton goes so far as to make 'property' an essential element of possession:—'*possessioun proprement est seisine et tenir de acune chose par cors et par volonté oveke la propreté*'. No comment on this is possible, except that the writer was too stupid to understand Bracton². Still we can make out that 'title' has now become essential to 'free tenement.' The plaintiff in the assize must have had 'title de fraunc tenement.' This he may have got by inheritance, by feoffment or the like, or again by peaceable seisin after a vicious entry³. The law therefore no longer endeavours to protect possession against ownership; but it will protect, even against ownership, something that stands as it were midway between possession and ownership, some *tertium quid*, that can only be described as 'title de fraunc tenement.' It is attempting to steer a very difficult course. Of its subsequent adventures hereafter⁴.

F. W. MAITLAND.

¹ Brit. vol. i. p. 258.

² Bract. f. 33 b. *Possessio est corporalis rei detentio, i. e. corporis et animi cum juris adminiculo concurrente*. By these last words, which he had from Azo, Bracton only means that there are certain things of which there cannot be a legally protected possession.

³ Brit. vol. i. p. 309.

⁴ As I do not wish that any one should trust my account of Bracton's theory of possession further than he can see it in Bracton's own pages, I will here give references to the most important passages. I regard the discussion on f. 162 b–164 b as governing all that is said in other parts of the book. Here Bracton is expressly answering the question, Within what time may I eject my disseisor? Then see f. 165 b, 168 (line 8), 183 b–184 b, 195 b, 196, 205, 209–210 b, 212 b (line 23); also f. 30 b–31 b, 51 b–52 b. It seems to me clear that Bracton in speaking of time has but two sets of phrases, (a) *post longum tempus, post longum intervallum, post longam et pacificam seisinam, &c.*, (b) *statim, incontinenti, nullo intervallo, flagrante disseisina, &c.*; the disseisor who is not ejected while the disseisin is 'flagrant,' is not ejected until after 'a long seisin.' As to excepting against a plaintiff that his possession was acquired *vi*; contrast what is said on f. 160, line 6 (a passage not very intelligible as it stands) with f. 210 b, lines 7–13, where Bracton quotes the Institutes '*is qui deiecit cogitur ei restituere possessionem, licet is ab eo qui vi deiecit vi, clam, vel precario possidebat*.' The Normans seem to have come to a different result in developing their assize, and to have refused this remedy to a plaintiff who had obtained his seisin by force used against the defendant. See Heusler, pp. 371–2.

THE LAW OF SETTLEMENT AND REMOVAL.

EVERY lawyer will agree that a prime cause of the deficiencies observable in our local government is to be found in the state of the law which concerns local authorities. The bulk and confusion of the law of local government have been repeatedly denounced, with much energy, if almost without result. But these evils would not be remedied merely by passing such an Act as successive Ministries have promised, for the consolidation of administrative areas and authorities. A complete code of local administrative law will be necessary. If codification is desirable with respect to laws administered by experts, how much more desirable must it be with respect to laws administered by boards of shopkeepers, farmers, or country gentlemen who hold office for periods too short to allow of a thorough acquaintance with public business, boards whose sole legal adviser is a busy and not always a learned solicitor! Such a codification of the law relating to local government would naturally reduce it under three principal heads: (1) Constitution of Local Authorities; (2) Local Finance; (3) Administrative Functions. It is pretty well agreed that the law comprised under either of the first two heads might be brought within a fraction of its present size, that one and the same authority is quite competent to make roads, suppress unwholesome nuisances, and relieve the poor; that money for these purposes can be raised just as well under one name and by one machinery as under many names and by many machineries. The law comprised under the third head does not admit of so much compression, because it treats of matters really various in kind. Making a road is a different process from relieving the infirm poor or teaching children to read and write. Still the law which regulates administrative functions might be abridged and simplified in a degree which can more easily be illustrated than described. As a primary subdivision of this law let us take the law which regulates the function of poor relief; and in this subdivision let us take the title of Settlement and Removal of the Poor.

Settlement is defined in Burn's 'Justice,' vol. iv. p. 316, as 'the right acquired in any of the modes pointed out by the poor-laws, to become a recipient of the benefit of those laws in that parish or place which provides for its own poor where the right has been last acquired.' It might have seemed possible to state with tolerable

brevity the modes of acquiring and losing a settlement. But the statutes relating to the subject are more than thirty in number, and their number gives no measure of their difficulty. As Mr. Fitzgerald expressed it in giving evidence before the Committee of the House of Commons which sat to consider the subject a few years ago, 'New law is frequently engrafted on the old without repealing the old, so that it becomes difficult, even for a lawyer, and almost impossible for a layman, to know what the law really is.' But the statutes are a trifle to the case law. The cases indexed under the heads of Settlement and Removal in the latest edition of Fisher's Digest occupy one hundred columns. More than five hundred pages of Burn's '*Justice*' are filled with them. Some, no doubt, are obsolete, for where the statutes have never undergone revision, cases linger on the books for years after they have become useless or dangerous. Still the operative law of settlement and removal remains bulky and obscure, and is thoroughly understood by few professional men, whether barristers or solicitors.

The object of this paper is to show briefly the growth of the statute law dealing with this subject, and to suggest how that law might now be recast. The statute law has grown up without any clear intention or methodic plan on the part of the Legislature. It is well known that, as early as the 12th year of Richard II, strict laws were passed for the repression of vagrancy. Naturally it was the object of these laws to make the destitute poor withdraw to places where they had resided or where they had been born. There, at least, they would have to be relieved, however grudgingly. In this way the vagrant laws insensibly established two modes of procuring a settlement; namely, birth and residence. But the modern law of settlement dates from the well-known statute 13 & 14 Car. II. c. 12, which first organized the system of removal of the poor by the order of the justices. This statute, short but incredibly diffuse, is so choice a specimen of the old-fashioned style of drafting statutes that it deserves to be quoted at length. It is as follows:—

'Whereas the necessity, number and continual increase of the poor, not only within the cities of London and Westminster with the liberties of each of them, but also through the whole kingdom of England and dominion of Wales, is very great and exceeding burthensome, being occasioned by reason of some defects in the law concerning the settling of the poor and for want of a due provision of the regulations of relief and employment in such parishes or places where they are legally settled, which doth enforce many to turn incorrigible rogues, and others to perish for want, together with the neglect of the faithful execution of such

laws and statutes as have formerly been made for the apprehending of rogues and vagabonds, and for the good of the poor; for remedy whereof and for the preventing of the perishing of any of the poor, whether young or old, for want of such supplies as are necessary, Be it enacted, that whereas, by reason of some defects in the law, poor people are not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or waste to build cottages, and the most woods for them to burn and destroy; and, when they have consumed it, then to another parish; and at last become rogues and vagabonds, to the great discouragement of parishes to provide stocks, where it is liable to be devoured by strangers: Be it therefore enacted, that it shall and may be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish to any justice of peace, within forty days after any such person or persons coming so to settle as aforesaid in any tenement under the yearly value of ten pounds, for any two justices of the peace, whereof one to be of the quorum, of the division where any person or persons that are likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person or persons to such parish where he or they were last legally settled, either as a native householder, sojourner, apprentice, or servant, for the space of forty days at the least, unless he or they give sufficient security for the discharge of the said parish to be allowed by the said justices.'

Well might the Poor Law Commissioners of 1834 observe of this statute that 'never was such important legislation affected by means of exceptions, qualifications and hints.' The object of the Act was simply to empower the justices, upon the complaint of the churchwardens or overseers, to remove from a parish any new-comer whom they thought likely at any time to require relief from the poor-rate. Such a law might easily be made the instrument of the grossest tyranny, and did actually inflict wide and deep injury upon the labouring poor. It practically confined to the parish in which he had obtained a settlement the man who had no property but his labour. In every other parish he was liable to be taken up and removed on the presumption that he might hereafter become a pauper. The cruelty of subjecting the mass of the people to such an arbitrary power was so evident that the Act provided that it should not be exercised unless within forty days of the arrival of new inhabitants in a parish. When the forty days had expired, the power of removal was lost. Thus, by indirect inference, forty days' residence in a parish gave a settlement there. Again, the Act provides that persons liable to removal are to be removed 'to

such parish where he or they were last legally settled, either as a native householder, sojourner, apprentice, or servant *for the space of forty days at the least.* By force of these words forty days' residence became the means, not only of acquiring a new but also of losing an old settlement. The Act expressly provided that persons settling in a tenement of the yearly value of £10 should be exempt from its operation, and, in this way, the occupation of such a tenement gave a settlement. Birth, too, was recognized as giving a settlement. The effect thus given to birth and residence seems to have been a recognition of the provisions of the common law. The common law also recognized estate, or property in land, as conferring a settlement on the owner, and marriage as conferring upon the wife the husband's, and birth as conferring upon the legitimate child the father's settlement.

The Act of the 3rd year of William and Mary, c. 11, completed the list of modes of acquiring settlement by adding (i) the exercise of any public annual office or charge in a parish for a whole year, (ii) being charged with and paying a share towards the public taxes or levies of the parish, (iii) being lawfully hired into the parish for one year, (iv) binding as an apprentice together with inhabiting in the parish. Residence was requisite for the purpose of obtaining a settlement in the first, second, or fourth mode; *Rex v. Woodbridge*, 4 B. & Ad. 711; *Rex v. Ringstead*, 7 B. & C. 607; *Rex v. Chelmsford*, 3 B. & Ald. 411; and *Rex v. Aldstone*, 2 B. & Ad. 207.

No sooner had the Legislature created all these modes of acquiring a settlement than it found it had gone too far, and began to impose fresh obstacles to the acquisition. Even before the passing of the Act last referred to, an Act of the 1st year of James II had provided that the forty days' residence which gave a settlement under the Act of Charles II should be reckoned only from the delivery to the overseers of a notice to be read in church and registered by them. This notice was not required to be given by persons who satisfied the conditions laid down in the Act of the 3rd year of William and Mary. Neither was it required in the case of unmarried persons having no children. By an Act of the 8th and 9th years of William III it was declared that nobody should acquire a settlement by being hired into the parish unless he continued a year in the same service. By the Act 9 Geo. I. c. 7 it was declared that no person should acquire a settlement in a parish by the purchase of an estate there for less than £30 longer than he should inhabit in such estate. By the Act 35 Geo. III. c. 101 it was provided that no person coming into a parish should be able to gain a settlement by the delivery and

publication of a notice in writing, or by paying taxes in respect of any tenement, not being of the yearly value of £10. The Act 6 Geo. IV. c. 57, after repealing a previous Act (59 Geo. III. c. 50) relating to the same subject, imposes the following restrictions upon acquiring a settlement by renting a tenement: (i) such tenement must consist either of a separate and distinct dwelling-house or building, or of land; (ii) must be rented for the sum of £10 a year at the least for the term of one whole year; (iii) must be occupied under such yearly hiring; (iv) the rent, to the amount of £10, must have been actually paid for the term of one whole year at the least. Finally, this Act was explained in a stringent sense by Act 1 Will. IV. c. 18.

But before the close of the last century the power of removal upon suspicion which the Act of Charles II had given to the justices was seen to inflict intolerable hardship upon the poor, and much inconvenience upon employers in a time of industrial revolution in which the demand for labour was varying at every moment in almost every district. Accordingly it was provided by the Act 35 Geo. III. c. 101, to which reference has already been made, that no poor person should be removed from the parish which he or she was inhabiting to his or her place of settlement, until such person should have become actually chargeable to the parish. Rogues, vagabonds, and idle or disorderly persons were exempted from the benefit of this Act. Its practical effect was to repeal the statute of Charles II, except in so far as that statute created new modes of settlement. And this was the condition of the law of settlement and removal at the time of the celebrated Commission appointed prior to the Act of 1834 to inquire into the working of the poor-law.

The Commissioners found that the effect of the law of settlement combined with the law which granted relief out of the rates to everybody who asked for it, without making any inquiry or imposing any conditions, was to defeat almost entirely the free circulation of labour. The burthen of the poor-rate in almost every parish was heavy, and was always becoming heavier; and the only means then known of checking its increase was to keep down, and if possible diminish, the number of persons chargeable upon it. Thus in a rural parish the farmer usually adopted one of three courses: (i) to employ no non-parishioners; (ii) to hire all his non-parishioners for less than a year; (iii) to prevent those whom he hired from sleeping in his own parish. The inconveniences of the first method were obvious; the second involved periods of utter idleness for the labourer, and tended to the worse practice of hiring him by the month or even the day; whilst the third led to a demolition of cottages, and brought about evils which half-a-century

has not altogether remedied. On the other hand, the labourer, accustomed to be maintained partially or wholly out of the rates, was fearful of losing his settlement in a parish where relief was profusely given; and in this way received a bribe to stay where he was not wanted. The Commissioners, upon consideration of these evils, recommended (i) the abolition of settlement by hiring and service, apprenticeship, purchasing or renting a tenement, estate, paying rates, or serving an office; (ii) that the settlement of every legitimate child until the age of sixteen years should follow that of its parents or surviving parent; and that, on attaining the above age or losing its surviving parent, it should be considered settled in the place where it was born; (iii) that the register of births or baptisms should be considered presumptive evidence of place of birth; (iv) that every illegitimate child should, until the age of sixteen years, follow its mother's settlement. The Act based upon their Report, 4 & 5 Will. IV. c. 76, abolished altogether settlement by hiring and service or by holding a parish office; abolished settlement by apprenticeship in the case of persons apprenticed to the sea-service; limited settlement by estate to such time as the owner should inhabit within ten miles of the parish; required for settlement by occupying a tenement the further condition that the occupier should have been assessed to and should have paid the poor-rate in respect of his tenement for the year; and gave effect to the recommendation respecting illegitimate children. The acquisition of a settlement by paying rates and taxes was not abolished. But it has been virtually annulled by the requirement of the Act of the 35th year of George III that the tenement in respect of which rates and taxes are paid should be of the annual value of £10. The Commissioners had considered, but did not suggest, the total abolition of the law of settlement.

Since the passing of the Act of 1834 the law of settlement and removal has been modified principally in four different ways: I. by the creation of the status of irremovability as distinct from settlement; II. by the substitution for most purposes of the common fund of the union for the several funds of the parishes comprised in it; III. by the enactments relative to the removal from England of paupers born in other parts of the United Kingdom; IV. by the abolition of derivative settlements. Each of these heads needs to be considered separately.

I. Creation of the status of irremovability.—By the first section of the Act 9 & 10 Vict. c. 66, it was provided that no warrant should be granted for the removal of any person from a parish in which he had resided for five years before the application for such a warrant. By the Act 24 & 25 Vict. c. 55. s. 1, the period of five was reduced

to one of three years, and by the Act 28 & 29 Vict. c. 79. s. 8, to a single year. Of course, residence in a prison, workhouse, asylum or hospital, or residence in discharge of military or naval duties, does not count for the purpose of these Acts. What degree of continuity the residence must possess is a point which has been elucidated in many decisions. But the general principle which they establish seems to be this: that, as the residence must be voluntary in order to give irremovability, so the acquisition of irremovability is not cut short by an absence with the intention of returning or by an absence not intended. Thus imprisonment in England, even of the species known as penal servitude, is not a break in the residence required by statute; *R. v. Potterhanworth*, 28 L. J., M. C. 56; see also *Reg. v. Whitby Union*, 39 L. J., M. C. 97. But where a pauper had slept one night with his family in a new house, and returned next day to the old one, upon learning that he had broken his residence, the residence was held to have been effectually broken; *Newark Union v. Glanford Brigg*, 2 Q. B. D. 522.

The above statutes further create the status of irremovability in the following special cases:—(i) Wife or child of irremovable person. (ii) Woman residing in any parish with her husband at the time of his death. She cannot be removed for twelve calendar months after his death, if she so long continue a widow. (iii) Child under the age of sixteen years, residing with its surviving parent and left an orphan, such parent having at the time of death acquired irremovability by residence. The orphan enjoys the same irremovability. (iv) Married woman deserted by her husband. Such woman can acquire irremovability as if she were a widow, and loses it only in case her husband returns to cohabit with her. (v) Persons becoming chargeable in respect of relief made necessary by sickness or accident. Such persons cannot be removed, unless the justices state in the warrant of removal that they are satisfied that the sickness or accident will produce permanent disability.

By the 34th section of the Act 39 & 40 Vict. c. 61, a residence of three years and of such a character as would under the statutes above quoted confer irremovability confers a settlement. In general, the enactments relating to irremovability very greatly reduce the practical importance of the law of settlement. It is true that a man may acquire a settlement in one parish and irremovability in another, and that if he goes into a third and becomes chargeable to the rates before a year is out he will be removed to the parish in which he was settled, and not to the parish in which he was irremovable. But it is hard to see what difference this makes to the pauper or to the ratepayers. Upon the whole, it may

be supposed that one case will balance another, and that the burthen is in the long run much the same. It would have been better to recast the law of settlement than to have invented the new status of irremovability.

II. Substitution of the common fund of the union for the several funds of the parishes comprised in it.—By the Poor Law Amendment Act of 1834 it was provided that each of the parishes in a union formed under that Act should be separately chargeable with the expense of its own poor, whether relieved in or out of the workhouse. By the Union Chargeability Act of 1865 this enactment was repealed, and all the cost of relieving the poor was thrown upon the common fund of the union. As the object of the law of settlement is to protect each locality from the expense of relieving paupers who have no claim upon it, the Union Chargeability Act destroys the practical importance of settlement as between parishes in the same union. As there are in England about 650 unions and nearly 15,000 parishes, the substitution of the larger for the smaller area has effected a considerable change.

III. The enactments relative to the removal from England of paupers born in other parts of the United Kingdom.—There are now in force five Acts of this description: the Act 8 & 9 Vict. c. 117, the Act 10 & 11 Vict. c. 33, the Act 24 & 25 Vict. c. 76, the Act 25 & 26 Vict. c. 113, the Act 26 & 27 Vict. c. 89. The general rule in the case of paupers having no settlement is that they are to be relieved in the place where they happen to need relief. As the English poor-law was operative only in England, it follows that poor persons who came from Scotland, Ireland, the Isle of Man, or the Channel Islands, and had not acquired a settlement here, had no settlement at all. If they needed relief, therefore, they became chargeable upon the place where they were residing. For many years no great inconvenience appears to have resulted from this state of things. But in this century the growth of a poor population in Ireland and Scotland, together with new facilities for emigration, produced an influx of paupers into many districts of England. The Act of the 8th and 9th years of Victoria, which repeals several previous enactments relating to the same subject, provides that the guardians or overseers may summon any person born out of England but within the United Kingdom and actually in receipt of relief before two justices, who, upon hearing, may make a warrant for his removal at the expense of the parish. A subsequent Act dispensed with the necessity of taking out a summons. There is nothing in these Acts to call for notice except that which they have in common with all the legislation upon this

subject—their patchwork character. Take one instance. The Act 24 & 25 Vict. c. 76 contains certain provisions respecting the removal of paupers from England to Ireland. The Act 25 & 26 Vict. c. 113, dealing with removals from England to Scotland and from Scotland to England and Ireland, repeats all the provisions of the former Act, but makes no attempt to consolidate the law. There is no law for the removal of English paupers from Ireland.

IV. Abolition of derivative settlements.—By s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, it is provided that ‘no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.’ This enactment carries out a recommendation of the Poor Law Commission of 1834. Its object is to prevent the tracing of settlements back through two or three generations. Thus if a child, having no settlement of its own, has a parent who has only a derivative settlement, the child is to be taken to be settled in its place of birth.

We have now traced in outline the history of the law of settlement and removal of the poor. During this century it has steadily increased in bulk and decreased in importance. At a time when the law of poor-relief was bad and its administration was worse; when the poor believed that they had a right to unlimited and unconditional out-door relief, and the parochial authorities paid wages out of the rates; when the poor-rate was constantly becoming more burthensome, and in one or two places had made the cultivation of the land unprofitable; at such a time it was natural that every parish should try to surround itself with an impassable barrier against the invasion of new crowds of paupers. Even then the protection given by the law of settlement cost a heavy price in the expense of litigation and removals. But with a reform in administration and in public ideas, the law of settlement lost most of its virtue. The Committee of the House of Commons which sat in 1879 recommended that in England the law of removal should be abolished, and that, for the purposes of poor-relief, settlement should be disregarded. With respect to seaport towns, however, they recommended that persons landing in a destitute condition and immediately applying for relief there should be chargeable to the place of their settlement for out-door relief.

The witnesses examined before the Committee were not unani-

mous in going so far. It was agreed that the law of removal was of little actual use, that removals often involved hardship, and that the procedure was expensive. It was stated that in one union the mere legal expenses of removal came to £6 11s. 7d. per head. Several recommendations were made:—that one year's residence in a union and birth should be the only heads of settlement, certain derivative settlements being retained; that chargeability orders should be substituted for removal orders, so that a pauper, whilst relieved in the place where he applies for relief, would be paid for by the place of his settlement; that the county rate, which is now in certain cases chargeable for lunatics and for the burial of bodies washed on shore, should be made chargeable in other cases. The first of these recommendations is clearly right. After a year's residence a person becomes irremovable under the present law, so that the financial effect is nearly the same now as if the change had been made. The distinction between settlement and irremovability is not justified by its usefulness.

The improvements required in the law of settlement and removal are, roughly, three. The first is to simplify and facilitate the acquisition of a settlement. This might be effected in the way just mentioned. The second is to repeal the Acts for the removal from England of paupers born elsewhere in the United Kingdom. The poorest districts of Scotland and Ireland have been so much reduced in population, and the preference of emigrants for new countries is now so firmly established, that we need not fear any noticeable accession to our paupers from the sister kingdoms. At the same time, it seems doubtful whether anything would be gained by abolishing the power of removal from one English union to another. The power is not much used at present; but it is held in reserve; it may be wanted later, and its existence is a check upon vagrancy. A settlement having been made easy of acquisition, and the granting of relief having been guarded with proper conditions, removals would become rare and their cost would be inconsiderable. Lastly, we require a consolidation of all the law of settlement and removal which will be left after making the above changes. The task is not really formidable. The reported cases are very numerous, but they contain in proportion less learning than usual. The subject is a mere branch of administration, which can be dealt with briefly, and would be so dealt with had we anything which could be called a Legislature.

The history of the law of settlement may be more easily grasped by reference to the following table, copied from the one given in the Appendix to the Report of the Committee of the House of Commons to which we have referred.

TABLE ILLUSTRATING THE LAW OF SETTLEMENT.

HEADS OF SETTLEMENT.	ORIGIN.	ENACTMENTS RELATING TO IT.	WHETHER OR NOT ABOLISHED.
Hiring and service ...	Statute	3 & 4 W. & M. c. 11. s. 7 8 & 9 W. III. c. 30. s. 4. 4 & 5 W. IV. c. 76. s. 64.	Abolished in 1834.
Serving parish office .	"	3 W. & M. c. 11. s. 6 4 & 5 W. IV. c. 76. s. 64.	" " "
Payment of parish rates.	"	3 W. & M. c. 11. s. 6 35 Geo. III. c. 101. s. 4. 6 Geo. IV. c. 57.	Virtually repealed since it was restricted to payment of rates in respect of a £10 tenement.
Apprenticeship ...	"	3 & 4 W. & M. c. 11. s. 8 31 Geo. II. c. 11. 56 Geo. III. c. 139. s. 5. 4 & 5 W. IV. c. 76. s. 67.	Abolished as to sea service and the trade of a fisherman in 1834.
Renting a tenement...	"	13 & 14 C. II. c. 14 6 Geo. IV. c. 57. 1 W. IV. c. 18. 4 & 5 W. IV. c. 76. s. 66. 39 & 40 Vict. c. 61. s. 34...	No.
Residence for three years in parish.	"	39 & 40 Vict. c. 61. s. 34...	No.
Estate	Common Law ...	9 Geo. I. c. 7. s. 5... 4 & 5 W. IV. c. 76. s. 68.	No. Restricted in 1722 and 1834.
Birth	Common Law and Statute.	13 Geo. III. c. 82. 54 Geo. III. c. 170... 39 & 40 Vict. c. 61. s. 35.	No.
Parentage	Common Law as to legitimate children. Statute as to illegitimate children.	4 & 5 W. IV. c. 76. s. 71... 39 & 40 Vict. c. 61. s. 35.	No.
Marriage with reference to the wife.	Common Law ...	39 & 40 Vict. c. 61. s. 35	No.

F. C. MONTAGUE.

COMPULSORY PILOTAGE.

WHEN a vessel in the ordinary course of navigation by the negligence of those on board runs into another ship, it seems reasonable that the owner of the offending vessel should be liable in damages to the owner of the injured ship. Yet by the law of England he is in many cases under no such liability. If his vessel was, as the phrase goes, in charge of a compulsory pilot, and the negligence which caused the loss was the negligence of the pilot alone, the sufferer by the collision is practically without a remedy. True it is that he may bring his action against the pilot who did the wrong, but in most cases this would be worse than useless, for the pilot, a seafaring man of slender means, is seldom worth suing, and money spent in taking proceedings against him would be thrown away. To an action against the owner of the offending vessel the answer of the Courts is this: So that you may recover damages against the defendant you must prove negligence in him or in his agents; but the ship that fouled yours was not being navigated by the defendant, nor by his agents; she was in charge of a pilot placed on board her by the law; his was the hand, or his the order, that drove her against your vessel; your remedy is against him alone. This may be good logic, as it undoubtedly is good law, but it is hard upon the owner of the injured ship. Hardship and grievous loss there is in many cases where uninsured shipowners and cargo-owners have their property destroyed in collisions for which they are entirely free from blame. Insurance, no doubt, mitigates the loss, but in the long run it comes home to the owners of carefully navigated ships, for underwriters must live, and premiums must be fixed at an amount sufficient to cover collisions caused by carelessly navigated ships, from the owners and pilots of which no damages are recoverable. But what if there is no insurance? Who pays for the very heavy losses inflicted every year upon the owners of property afloat in the Thames by steamships conducted up and down the river by compulsory pilots? Mr. Lee, barge-owner of Rochester, in his evidence before the Pilotage Committee of 1870 throws some light upon this question. In one year he had property destroyed by the negligence of compulsory pilots in charge of steamships in the Thames to the amount of £900. Of this sum not a farthing was recovered. In the four years 1863-1867 over £6000 was lost by owners of small

sailing craft in the river from the same cause, and of this only £660 was recovered. Only the other day the *Girdler* lightship herself was sunk on her station at the mouth of the Thames by a heavy steamship, the *Indus*, in charge of a compulsory pilot, and it is still uncertain whether her owners will recover a farthing of their loss. The case has already been before two Courts, which have arrived at contrary conclusions as to the liability of the *Indus* owners, and it is understood that an appeal to the House of Lords is pending. There is a certain irony about this case of the *Indus*, for the owners of the sunken lightship are the Trinity House itself, the very pilotage authority that licensed the pilot of the ship that did the damage. These are only instances of hundreds of collisions for which there is practically no redress. The records of the Admiralty Courts abound with cases in which sufferers by collisions have appealed to the law and have failed in their actions solely because the wrong-doing vessel was at the time of the collision being navigated by a compulsory pilot. As stated above, the remedy against the pilot is practically worthless, but, as if to make this doubly sure, the Legislature has provided that in no case shall a London Trinity House pilot be liable beyond the sum of £100.

The history of the legislation which has produced this striking example of a wrong without a remedy is as follows. Prior to the eighteenth century, pilotage appears to have been free for all ships throughout the United Kingdom. Long before this date, probably from the earliest days of our mercantile marine, there existed a class of men skilled in conducting vessels through the outlying sands and dangers which infest our coasts, and these men associated together in guilds were controlled by the London Trinity House and other corporations created by charter at least as early as the sixteenth century. But it does not appear from the statute book that the employment of a pilot was obligatory upon ships until the year 1716. In that year an Act (3 Geo. I. c. 13) was passed, by the preamble of which it was declared that 'the very useful and well regulated society or fellowship of pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, who have always had the sole piloting and loadmanage of all ships and vessels from the said places up the rivers Thames and Medway, . . . hath been much discouraged, and several ships and vessels with their cargo and mariners have been lost or in the utmost danger and hazard by reason of their neglect to take properly qualified Trinity House pilots.' The Act creates in favour of the privileged pilots a monopoly of pilotage from the places above named up the Thames and Medway, and it imposes a penalty upon unlicensed persons

undertaking to act as pilots; it provides for the licensing of 120 pilots, but (sect. 3) expressly declares that shipmasters may choose their own pilot. Pilotage therefore to London for inward-bound ships was regulated only not made compulsory by this Act. The next Act, 5 Geo. II. c. 20 (1732), dealt with the London Trinity House pilotage, that is pilotage for outward-bound ships through the Downs, and ships entering or leaving the Thames by the Swin (or North) Channel. This Act does not in terms make pilotage for such ships compulsory, though, from an express provision (sect. 1) which it contains to the effect that nothing in the Act shall oblige colliers or coasters to take a pilot, it looks as if the intention of the Legislature was that in other cases pilotage should be compulsory. The next Act, 48 Geo. III. c. 104 (1808), for the first time imposes a penalty upon ships refusing to take a pilot. This penalty,—payment of double pilotage,—was continued in 1812 by 52 Geo. III. c. 39. This Act contains a new feature, namely (sect. 30) an express exemption of shipowners from liability for loss or damage caused by the negligence of a licensed pilot. The exemption is not in terms confined to cases where the employment of the pilot is obligatory, though this probably was the intention, and may have been the effect of the Act. Up to this time the modern doctrine of the owner's non-liability upon the ground that the pilot is not his agent had not been promulgated, and from the terms of the enactment above referred to it would seem that the contrary had been assumed to be the law. The next Act (1825), 6 Geo. IV. c. 125, which repeals all previous Acts, is very important in the history of the law of compulsory pilotage. It enacts (sect. 19) that the master of every ship inward bound to the Thames shall before passing the Brake sand (off Deal) take the pilot who shall first offer and '*shall give charge of his ship*' to such pilot. Here probably we have the origin of the mischievous doctrine which now obtains in the Law Courts that the pilot supersedes the master in the charge of the ship, with its corollary that the owner is not liable for the pilot's negligence. By the same Act (sect. 55) the exemption of owners from liability 'where and so long as such pilot shall be duly qualified to have charge of such ship' is re-enacted; and the system of exempting by Order in Council particular classes of ships from compulsory pilotage is first created. The power to exempt extended only to certain foreign ships where British ships of a similar class were already free. In 1828 a short Act, 9 Geo. IV. c. 86, dealt with the area of Cinque Port pilotage. In 1840 by 3 & 4 Vict. c. 68 further power to exempt foreign ships from compulsory pilotage was given to the Queen in Council. The power was seldom exercised, but the language of the Act is worthy

of notice, for it distinctly recognises the fact that pilotage was a burden from which it was desirable to relieve foreign ships. By 1849 the owners of passenger steamships had begun to feel the burden of pilotage, and an Act, 12 & 13 Vict. c. 88, was passed, which, after reciting the grievance to which the short-voyage passenger steamships were subject in the matter of pilotage charges, provided that such vessels should be relieved from the obligation to take a pilot if their masters or mates obtained a pilotage certificate from the pilotage authority exercising jurisdiction over the waters in which the ships plied. This was a new departure in pilotage law, and the interference with the vested interests of the existing pilots was not approved of by some of the local pilotage authorities. They seem to have been slow in granting the new-fashioned pilotage certificates, for in 1853 we find an enactment (16 & 17 Vict. c. 129, sect. 14) transferring to the Board of Trade the power to grant pilotage certificates for passenger steamships where the local authority refused to do its duty. In the same Act there is a variation of the language already referred to of the Act of 1825 as to masters of ships giving over the charge of their ships to pilots whom they are required to take on board. Instead of requiring the master to 'give charge of his ship' to the pilot according to the words of the Act of 1825, sect. 7 of the Act of 1853 requires him to 'give the charge of piloting his ship' to the pilot. It does not appear whether any alteration of the law was intended by this change of words, nor is the change noticed in any of the cases dealing with the question noticed below as to the relative position and duties of master and pilot.

In 1854 the Merchant Shipping Acts were codified by the Merchant Shipping Act (17 & 18 Vict. c. 104) now in force, and this Act contains the bulk of the existing law touching pilotage. The general scope of its provisions with regard to compulsory pilotage was to leave matters *in statu quo*, but in one important respect it extended compulsion. The history of the matter was this. In the early days of steam passenger traffic by sea there arose a cry, similar to that lately raised with such vehemence by Mr. Plimsoll and Mr. Chamberlain, for statutory protection of life at sea. One or two cases of gross incompetence and culpable negligence on the part of steamship owners and masters resulting in lamentable loss of life had excited the public mind, and a loud cry for legislative interference was raised. Unfortunately the Legislature, under the direction of Mr. Cardwell, did interfere, and, together with some harmless enactments touching the equipment and supervision of passenger steamships, it made (17 & 18 Vict. c. 104. sect. 354) pilotage compulsory for all passenger steamships

plying between places in the United Kingdom. The idea was to protect the helpless passenger public who go down to the sea in ships by ensuring for them the services of a local pilot. There is grave reason to doubt whether the good intentions of Mr. Cardwell have saved a single life, but it is certain that they have imposed upon steamship owners a heavy burden in pilotage charges. So heavy was the charge upon passenger steamships trading from Liverpool that a compromise was arrived at between the pilots who benefited and the shipowners who suffered by the new law, whereby, in consideration of a payment by the shipowners to the pilots of a sum of about £1500 yearly, the pilots agreed not to force their services upon the ships that did not need them. This seems a *reductio ad absurdum* of the Act of 1854, the object of which was, not to benefit the pilots, but to ensure the services of a licensed pilot for every passenger steamship. In the result it has altogether failed in this object so far as Liverpool is concerned; yet it does not appear that any loss of life has followed.

Such is the history of the general Acts relating to pilotage in this country. Besides the general Acts, there have been passed and are now in force a multitude of local Acts regulating pilotage in various ports and rivers of the United Kingdom. Some of these make pilotage compulsory, and others leave it free. The Acts are in number upwards of thirty, and there are besides a vast number of Orders in Council giving effect to pilotage rules made under the local and general Acts by the various pilotage authorities. This maze of legislation, a marvel of intricacy and clumsiness, is an inexhaustible quarry for Admiralty lawyers. The important question in every case of a collision between two ships is, not which ship was in fault for the collision, but was pilotage compulsory for either or both ships? The Acts and rules bristle with anomalies and contradictions, and many of them are so clumsily worded that it is almost impossible to construe them with any degree of certainty. To extract any principle or reason from the arbitrary impositions of and exemptions from compulsion to employ a pilot is altogether a hopeless task. Only the other day it was discovered, after long arguments in three Courts and before six Judges, that pilotage for foreign ships in the Tyne was not compulsory, but that the freedom from compulsion rested upon an Order of the Board of Trade which it may be safely asserted was not intended by the Board of Trade to touch the subject. A few of the more striking anomalies in the existing pilotage law may be cited. A ship in the Thames on a voyage from the Mediterranean must take a pilot; the same ship on a voyage from the Baltic need not. A British ship bound to London from the Baltic need take no pilot;

a foreign ship must, unless she enters the river by the Swin (or North) Channel. One Act enables certain British ships (without reference to passengers) to navigate the Thames without a pilot; a subsequent Act enables the same ships to navigate the same waters without a pilot only 'when not carrying passengers.' The Courts have decided that these ships need take no pilots whether carrying passengers or not. A foreign ship may carry passengers from London to Hamburg without a pilot; a British ship may not. A passenger ship may sail from Harwich to Rotterdam without a pilot, but not from London to Harwich. Now mark the result of this arbitrary imposition of compulsory pilotage in case of collision. Two ships, *A* and *B*, come into the Thames, *A* by way of the Swin, *B* from the Downs through Prince's Channel, and get into collision by the fault of their respective pilots; *B* has a remedy, *A* has none. A homeward-bound ship takes a pilot off the Lizard or the Wight; if by his fault she is in collision to the westward of Dungeness, her owner is liable, if to the eastward of the Ness, he is free. So a passenger steamship navigated by a master who has a pilotage certificate is a heavier risk to her owners or insurers than one whose master has not the knowledge or skill to qualify him to pilot his own vessel; for if she fouls another ship her owners are liable for the damage she does, whilst a rival ship whose master has no pilotage certificate may sink other ships with impunity so long as her compulsory pilot is in charge.

Again, as to the outports, it is difficult to see why in some pilotage is free and in others compulsory. In the Bristol Channel, generally, it is free; in the Mersey and Clyde, compulsory. To Cardiff it is free; to Bristol compulsory. At Falmouth, though one of our easiest harbours, it is compulsory; so at Plymouth, Dartmouth, and Cowes; yet from Orfordness to London it is free. There is no more difficult piece of navigation than that through the outlying sands off the Suffolk and Essex coasts to London, yet here pilotage has always been and now is absolutely free. On the other hand, if a vessel calls for orders at Falmouth, or runs into Plymouth, Dartmouth, or Portland, for coals, all places easy of access in almost any weather and having no outlying dangers, she must pay a heavy pilotage. It passes the wit of man to discover a reason for the imposition of pilotage in the one case which does not apply with much greater force in the other where the law incontinently declares pilotage to be free. This much at least is clear, that regard for the safety of life and property at sea has little or nothing to do with the matter.

But it is evident that the policy of the Legislature in this matter of pilotage has from time to time varied considerably. The lan-

guage of the early Acts indicates that compulsory pilotage was established, partly with a view to benefit the pilots, but mainly with a view to save life and property at sea. In the early part of the last century when these Acts were passed there were no light-ships, few lighthouses beacons or buoys, and navigation in narrow waters was practically impossible for ships of heavy draft without the assistance of local pilots. To ensure a supply of competent men it may well have been necessary to create a monopoly and to compel all ships to employ pilots. But at the present day the system is an anomaly and in many cases a heavy burden on ship-owners. About the mouth of the Thames there are hundreds of seafaring men fully qualified by local knowledge to act as pilots, but not licensed by any pilotage authority. Some hundreds of these men do in fact earn a good living by piloting vessels not required by the law to take a licensed pilot, and few ships come up to London without a pilot of some kind to assist them in the upper reaches of the river. The pilotage system in the Thames is therefore at the present day partly compulsory and to a very large extent voluntary. Alongside the licensed Trinity House pilots there exists a far more numerous body of unlicensed men who carry on a great part of the pilotage of the river. The compulsory system is gradually giving way to voluntary or free pilotage, and except perhaps for the purpose of ensuring a supply of pilots off Dungeness for the inward-bound ships, there seems no reason why compulsory pilotage in the Thames should not be altogether abolished.

The stronghold of compulsory pilotage is Liverpool. There a very efficient pilotage service is worked under a local Act upon the compulsory system, and there is a strong opinion amongst Liverpool shipowners in favour of the existing system. The circumstances of the Mersey are different from those of the Thames, and the arguments in favour of compulsion at Liverpool carry more weight than elsewhere. The exposed character of the approaches to the Mersey necessitates the employment of powerful pilot vessels. These are stationed at particular spots outside the entrance of the river, and keep the sea in all weathers with a large number of pilots on board to serve inward-bound ships. It is contended that such vessels can be provided and maintained only under a system which compels all vessels to take or pay for pilots in fine weather as well as foul. But it is not clear that the free system, which has answered admirably at Cardiff, would not answer equally well at Liverpool. At Cardiff the pilots work independently of each other in small cutters which pick up the ships far down the Bristol Channel. After a long struggle, Cardiff, Gloucester, and Newport,

the rising ports on the Bristol Channel, freed themselves in 1861 from the yoke of compulsory pilotage which Bristol tried to force upon them. Hence it is that pilotage to Bristol remains compulsory under an old Act of George III, whilst pilotage to the younger and more thriving ports is altogether free. No complaints are made that vessels bound to these ports cannot find pilots, and the change from compulsory to free pilotage has proved a great success. At Falmouth on the other hand, where the compulsory system of the London Trinity House prevails, ships complain that pilots are not to be met with off the port in bad weather. Falmouth and Cork are the two most important ports at which ships arriving from foreign voyages call for orders. Both are singularly easy of access and free from danger; at Cork (or Queenstown) pilotage is free, at Falmouth it is compulsory. An attempt was made by an Act passed by Mr. Milner Gibson in 1862 (25 & 26 Vict. c. 63) to exempt ships calling for orders from the burden of pilotage, Falmouth being especially aimed at; but the Act is not well worded, and it is doubtful whether it effects the object which its framers had in view.

Falmouth is not the only port at which complaints have been heard that the compulsory system fails to ensure a supply of pilots for inward-bound ships in heavy weather. Nothing can be worse for the shipping interest than this. It is of the last importance for a ship approaching the land at the end of a long voyage in thick or heavy weather, uncertain perhaps of her true position, that she should fall in with a pilot before she finds herself in narrow waters and gets hampered by the tides and shoals which it is the pilot's business to keep her clear of. With the free system, competition drives the pilots far out to sea, and in thick and heavy weather they are sure to be on the alert and on the look-out for ships. The Deal boatmen, and even Thames watermen in the North Channel, are always to be found in such weather cruising far out at sea. It is an open question whether the London pilots should not be sent further down Channel than Dungeness to board ships running up before a westerly gale, instead of cruising about, as is now their practice, under the lee of the Ness. There is reason to think that many ships have got into trouble and have been set over into the Boulogne bight by standing on too long in the hope of making the Ness and falling in with a pilot.

For fifty years this question of free *versus* compulsory pilotage has been agitated. In 1870 a strong Committee reported in favour of the free system, and Bills have been brought in for abolishing compulsion, yet nothing has come of it. Mr. Plimsoll and Mr. Chamberlain have twice raised the cry of rotten and unseaworthy

ships, but both refused to touch the question of pilotage, on the ground apparently that it had nothing to do with loss of life at sea. Yet it can scarcely be doubted that a law which enables the larger and swifter and therefore more dangerous class of vessels to run down others with impunity tends to reckless navigation and loss of life. The fact is that this matter of compulsory pilotage is so little understood by the public, so complicated and technical in its details, that no one likes to grapple with it. Pilots moreover and pilots' friends have votes, and the Government that undertakes the abolition of compulsory pilotage will bring a hornets' nest about its ears. These considerations have greater weight at the present day than they ever had before, and make the task of attacking the pilots' monopoly a dangerous one. Free trade moreover is just now under a cloud, and free pilotage has a ring of free trade about it that makes politicians more shy than ever of touching it. But this much should at all events be insisted upon, that compulsory pilotage be not extended. It seems doubtful whether even this will be conceded, for this year a Bill has been brought in of which the object is to compel foreign steamships carrying passengers between ports in the United Kingdom to employ pilots. It is to be hoped that the Government will give no sanction to this retrograde proposal¹. It is a pilots' Bill, and nothing else; the suggestion, of which some hints have appeared in the newspapers, that by allowing foreigners to navigate their own vessels in our harbours we are enabling them to acquire knowledge which will be used against us in time of war, is a mere blind and will not bear a moment's consideration.

Since therefore compulsory pilotage seems likely to remain the law of the land for some time to come, it may be worth while to examine the doctrine of the Courts which prevents the sufferer by collision caused by the fault of a compulsory pilot from recovering damages from the wrong-doing ship or her owners. This doctrine rests upon the assumption that the pilot is not the agent of the shipowners, that the law which obliges the shipowner under a penalty to employ the pilot takes the ship out of the owner's charge and places her in the charge of the pilot. In the words of Dr. Lushington (*The Peerless*, Lush. 45), 'Where a person is compulsorily put on board a vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice

¹ Since these pages were in type this Bill has been withdrawn upon the Government promising to appoint a Committee to enquire into the whole subject of pilotage. But it is an ominous fact that the Trinity House has recently refused to grant pilotage certificates to the masters of foreign steamships, and that a *mandamus* to compel it to grant such certificates was refused by a Divisional Court in the presence of the Law Officers.

to hold such an owner responsible' for the negligence of the pilot. Now from beginning to end of the Merchant Shipping Acts now in force there is no such enactment as Dr. Lushington suggests. There is a section (sect. 388) of the Act of 1854 which relieves the owner from liability for damage caused by a compulsory pilot 'when acting in charge of' his ship; but it is a strong thing to say that these words by implication supersede the master's authority on board his ship and place the pilot in charge. Surely if the Legislature had intended to make it illegal for a master or the owner himself to navigate his ship when a pilot is on board, it would have said so in express terms. But neither has the Merchant Shipping Act done this in terms, nor in practice has the Act been applied in this way. It would be a surprise to shipowners to learn that the right and the duty of a pilot is to take the command of the ship out of the hands of the owner or of the master to whom the owner has entrusted it. On board well-regulated ships and with the best class of shipowners the practice is for the captain to retain the command under all circumstances, and the idea of his being under the orders of a pilot would not for a moment be tolerated. The decisions of the Law Courts and the terms of the Merchant Shipping Acts relieving owners from liability for damage caused by the pilot have no doubt introduced some confusion into the matter, and masters are unwilling to interfere with the pilot for fear of making their owners liable for damage which they see will be the result of carrying out the pilot's orders. But as a matter of discipline on board ship there cannot be a doubt that the owner if he sails his vessel himself, or his master if he does not, has the right to give any order to the helm he thinks fit, notwithstanding the presence on board of a pilot, whether compulsory or not. The question has arisen in some recent cases where French, Suez Canal, or Danube pilots have been taken on board under compulsion by the foreign law of paying the pilotage charges, whether the shipowner is liable for collisions caused by the negligence of these 'compulsory' pilots; in every case it has been decided that the shipowner is liable. These cases show that there is no rule of English maritime law which requires the master of a ship to give over the charge of his ship to a pilot properly taken on board; and it is difficult to see why, if the pilot is the agent of the shipowner in these cases, he should not be equally his agent where the compulsion is by English law. A theory was started by Dr. Lushington, that upon grounds of public policy and as part of the common law of the sea it is necessary that where a pilot is on board he should have command of the navigation of the ship. There must, it was said, be no double command, no divided respon-

sibility, or we shall have contradictory orders given to the helm at critical moments, and untold evils will be the result. And Beawes lays it down that 'after a pilot is taken on board the master has no longer any command of the ship till she is safe in harbour.' We doubt whether modern shipowners would assent to this proposition. It is certain that some of the best-known lines of steamships are navigated upon the opposite principle, and that their masters are expressly instructed never to abdicate their command in favour of a pilot who perhaps has never been on board the ship before and knows nothing of her peculiarities or behaviour under steam and helm. The true and seamanlike view of the pilot's position and functions is that he is taken on board to assist the master with his local knowledge with regard to dangers, tides, and shipping likely to be met with; and this being so, the responsibility of every order to the helm should as matter of law, at any rate as regards third parties whose ships may be sunk in consequence of those orders being carried out, rest with the shipowner. It may be added, that the laws of almost all foreign countries accord with this view. Germany alone has an express enactment similar to sect. 388 of our own Merchant Shipping Act, exempting owners from liability for damage caused by a compulsory pilot (Art. 740, Allgemeines Deutsche Handelsgesetzbuch). As a set-off to this solitary peculiarity of German law may be quoted the recent Statute of the Dominion of Canada, 36 Vict. c. 54 (Canada), ss. 56, 69, which has reversed the legislation of the mother country by expressly enacting that the shipowner shall be liable for damage caused by a compulsory pilot.

The truth is that the statutory exemption of shipowners from liability for damage done by a compulsory pilot is part of the exceptional and mischievous legislation which exempts shipowners from liabilities to which the rest of the world is liable by the Common Law. It is part of the protective system applied to shipping matters which we copied from the Dutch in the days of our fierce rivalry with Holland upon the seas two hundred years ago. The Navigation Acts, compulsory pilotage, and the limitation of shipowners' liability for the negligence of their servants at sea are intimately connected with one another in point of policy. The Navigation Acts have gone, and our mercantile marine has advanced by leaps and bounds since their abolition. The law which enables a shipowner to run down and sink ships, to drown people and destroy property afloat at a cheaper rate than is permitted to other people still remains. This law and the law of compulsory pilotage, with its attendant exemption of shipowners from liability, are direct incentives to negligence and carelessness

in a business which above all others requires the constant and minute attention of those engaged in it, namely the navigation of ships at sea. In these days, when so many wild proposals are being made for legislative protection of life at sea, it would be well to consider whether the wholesome doctrine of *respondeat superior* might not be applied with advantage to the shipowner who under cover of compulsory pilotage permits his ship to be carelessly navigated by a pilot whom he is at liberty at any moment to supersede. If, as probably would be the case, such a change in the law were to lead to the speedier abolition of compulsory pilotage, it would be doubly beneficial.

R. G. MARSDEN.

REGISTRATION OF TITLE IN PRUSSIA.

- (1) Report by MR. C. S. SCOTT, Secretary to H. M. Embassy at Berlin, on the Conveyance and Registration of Land Titles in Prussia. Presented to both Houses of Parliament, June, 1887.
- (2) Die Preussischen Grundbuch und Hypotheken Gesetze vom 5 Mai, 1872. F. WERNER. Berlin, 1873.
- (3) Commentary on the Prussian Law of 1872, in the *Annuaire de la législation étrangère*, by P. GIDE. Paris, 1873.

REGISTRATION of Title has been established in the Kingdom of Prussia ever since the year 1872, and has succeeded there quite as well as in our own Australasian Colonies. It is hoped, therefore, that the following short study will not be thought wholly unprofitable at the present juncture in England.

In some respects the Prussian experience may be even more useful to us now than the study of the Torrens system in Australasia. For, first, the statutes establishing Registration in Prussia had the advantage of being drawn by skilled lawyers, an advantage which will be apparent on the merest glance at the two bodies of legislation¹. Next, the general condition of land titles, and the uses to which land is habitually put in Prussia, furnish a much nearer parallel to the case of England than the same things in Australasia: and, further, both in the detailed development of the strong points of the system, and in the speed and cheapness with which sales and mortgages are conducted, the practical results obtained in Prussia appear in some respects to be even better than those obtained in our own colonies. It is proposed in the following article to attract attention, as far as possible, to those points in the Prussian system which contain lessons for ourselves, supposing we choose to read them.

The system previously in force was Registration of Deeds². But the usefulness of this Deed Registry was much impaired by

¹ The bad drafting of the Torrens Acts is the subject of incessant comment by the Australian judges, and legal authorities generally: the following extract from a recent judgment by Sir James Martin, C. J. of New South Wales, is one instance among many:— 'We have been referred to a number of sections of the Real Property Act, which, as I have said on many other occasions, is very badly drawn, and perhaps necessarily so, as it was a novel idea, originated by a man who knew nothing about law, although he may have been assisted by professional advisers; and even the most skillful lawyers will find it a difficult matter to draw such an Act with precision and clearness.'

² Registration was not requisite for the validity of a deed, but it conferred priority, as under our own Middlesex and Yorkshire Acts.

a practice which largely prevailed of not registering conveyances of land, but only mortgages. This practice was the accidental result of a rule of the Prussian general law which required delivery of possession (our 'livery of seisin') for the completion of a conveyance. For it will readily be seen that if delivery of possession is necessary to complete a conveyance, a purchaser has the less motive to register his purchase deed, because as long as he holds possession no subsequent conveyance can be completed behind his back. With mortgages, however, it was different: no act on the land being required, a mortgagee had no means but registration to preclude the possible loss of his property.

Nor again, even where all formalities were complied with, was there any more absolute protection against hostile claims than exists among ourselves in register counties. If the vendor's title was impeachable, the purchaser's was too, even though completed by conveyance, registration, and delivery of possession. Nor was this all; it appears that even in cases where the vendor's right to convey the legal estate was good, yet, inasmuch as the doctrine of notice was pushed by the Prussian Courts to a disagreeable length (as it has occasionally been pushed by ours), genuine purchasers for value were sometimes ousted by the owners of prior equities which they had omitted to consider or inquire for. Finally, it seems to have been thought a hardship that, though there existed (in the public cadastral survey) what purported to be an exact description of all estates, yet that survey furnished no guarantee that the description was not obsolete and incorrect owing to encroachments, ripened by prescription, effected since the survey was made.

These uncertainties appear not to have been much complained of till about thirty years ago, when the long peace and consequent increase of commerce and industry caused dealings in land and mortgages to become more frequent and important. In the year 1857, however, a resolution of the Prussian Upper Chamber was passed, demanding that a bill reforming the mortgage law should be presented with as little delay as possible. In 1860 the Lower Chamber passed a similar resolution. In 1861 and 1862 private members introduced bills dealing with the subject, which were not carried. In 1864 a bill was drafted by the Minister of Justice, and submitted to the Judges and the Faculties of Law, but was so severely criticised by them that it was not presented to the Legislature. In 1868, however, a partial experiment was tried; a law was passed to apply to the Island of Rügen and a part of Pomerania, where the ordinary Prussian law was not in force; and

this experiment was so completely successful that the general legislation could be no longer delayed, and accordingly, on the 30th of November, 1868, the Minister of Justice, Leonhardt, presented to the Chamber of Deputies a bill which, with many amendments, and after a long interval occasioned by the war with France, was ultimately passed into law on the 28th of April, 1872, to come into operation on the 5th of May in the same year. That law is still in force.

Comparing the antecedent state of things in the two countries, it will be seen that in Prussia two or three circumstances existed facilitating registration, which do not exist, or exist only partially, in England.

For one thing, an official system of recording dealings with land already existed. There were local registries in every market town, and a complete staff of officers was on the spot: thus the initial expense to the State, and the difficulty of making numerous appointments, were reduced to nothing.

Next, the landowners were accustomed to register their mortgages, and possibly some of their sales; they were personally acquainted with the registrars, and accustomed to transact business with them; so the change made but little disturbance in the ordinary routine work of mortgage and sale.

Finally, all mortgages being registered, and all estates being defined in the cadastral survey, there existed, ready to hand, public evidence of title, of a kind which, though not perfectly conclusive in every instance or in every respect, was still sufficiently good (in conjunction with an insurance scheme which formed an integral part of the new law) to furnish much valuable help to the Government in investigating titles. Thus the difficulty of absolute title was much lessened.

It would seem, however, not to be entirely free from doubt whether in England we have really availed ourselves as fully as we might have done of the facilities we do possess for granting absolute titles, or at any rate *guaranteed* titles,—as those proposed to be entered as ‘absolute’ under the Bill of last session ought more properly to be termed. An inspection of the sort of evidence principally relied on in Prussia for guaranteeing titles will make this appear more clearly.

Under sect. 135 of the 3rd law of 5 May, 1872, what we should call absolute title is offered to all who can furnish either of the following alternative sorts of proofs:—

1. Mere possession for forty-four years:—
2. Possession for ten years, coupled with *prima facie* evidence that such possession had a definite legal commencement.

3. Possession for less than ten years, commencing with a root of title of proved validity, and either
proof of possession by self and predecessor, together, for ten years ; or

proof that the predecessor had a valid root of title.

4. Production of a 'certificate of ownership.' These were obtainable under the old law, and operated to bar adverse claims: the process of proof involved (1) public advertisement ; (2) proof of possession ; (3) a certificate by a local authority that the applicant had acquired the property by legal means.

5. Purchase at a 'judicial auction' (Fr. tr. calls the purchaser 'adjudicataire à la suite d'une expropriation forcée').

Possession could be established either by documentary proofs, or the evidence of witnesses, or by certificates of local authorities.

Now, probably the great frequency of life estates, and estates tail, and long leases, and the want of a previous register of mortgages, would render the first form of proof—mere possession for forty-four years—too precarious for adoption in this country ; but it may well be considered whether any serious risk of error—that is to say, any greater risk than a very moderate insurance charge would cover—would attach to our permitting the other sorts of proofs above enumerated to be offered, where the ordinary method of examination of title seems likely to prove expensive.

The following four alternatives roughly correspond in English terms to the 2nd, 3rd, 4th, and 5th of the Prussian alternatives given above, and will enable the reader to judge for himself as to the value of the last suggestion.

1. Possession for ten years, coupled with production of the last conveyance or will, or evidence of succession.

2. Possession for less than ten years, commencing with a conveyance for value, and either

proof of possession by self and predecessors in title for ten years ; or

proof of an antecedent conveyance for value.

3. Public advertisement, five years' possession, and, if in a register county, the last conveyance ; if not, an affidavit by a solicitor that the applicant or his predecessors in title were purchasers for value.

4. Purchase from the Court, or under the Land Clauses Acts, or from the Crown, or any public department.

Possession may be proved by

(1) Receipts for land tax given by the Land Tax Commissioners, or receipts for rates from local authorities.

(2) Certificate of one local magistrate, or affidavit of two local ratepayers, or one local solicitor.

Should this suggestion attract any attention it can be further elaborated, and, if need be, supported by argument, but meanwhile it will be better to pass on to the less pressing, but equally important subject of the general features of the Prussian registration when established as a 'going concern.'

In some points the effect of registration in Prussia is very similar to the effect of registration under our own Act of 1875, in others not. The registered owner is the only person who can legally transfer or mortgage the land; adverse possession has no effect upon his rights; a registered transfer from him is good, even though the transferee had notice of a prior equity in another. (Our Act of 1875 is most unsatisfactory on this latter point: sections 30 and 35 are the only ones which approach the subject at all, and it is impossible to feel any certainty whether they would be held to affect the old doctrine of notice or not.)

The processes of transfer and mortgage can be performed either at a distance from the office, by writing executed by both parties in the presence of a notary or judge; or at the office, by making an oral conveyance before the registrar. In either case the registrar, on receiving the writing or hearing the oral conveyance, makes the required entry (this passes the property), and gives the appropriate certificate. Proof of the identity of the transferor, or of the legal capacity of the transferee to hold and dispose of land, are also required.

As to settlements—life estates, and reversions, and charges raisable at a future time, for children of a marriage, can be registered direct. Thus the Prussian (like the Torrens) system gives more facilities (oddly enough) for settled estates than our own Act of 1875, which allows nothing to be directly registered but absolute ownership in freeholds or leaseholds.

Actions respecting land (*lis pendens*) and sales in course of completion can be noted on the register, and when this is done all registered dealings are subject to such notes.

Mistakes of the officials are rectified by the order of a judge, while the persons injured (if any) are compensated for their loss. The person occasioning the error is first liable, then the official through whose fault the mistake was made; failing these remedies, the State pays. The surplus from fees suffices to cover this risk; in other words, the Mutual Insurance system is used. In fact, no system of Registration of Title that has had extensive application has done without insurance, and it is only to be wondered at that so grave an omission should ever have been tolerated in our own.

Insurance was included in Lord Westbury's Bill in 1862, but was struck out on the motion of some astute member of the House of Commons, who (if he understood the effect of what he was doing) must have thought simply that the State might with justice confiscate a man's property, but could not with prudence undertake to compensate him for the loss.

The system also presents to the world a very remarkable *novelty*, namely, a new sort of mortgage. The old German 'Hypothek' corresponds pretty nearly to our mortgage in practice: this is left undisturbed by the new system; but there is also introduced a new kind called a 'land-charge' (*Grundschuld*). The land-charge differs from the mortgage in that it is not, like the latter, an accessory to a personal debt, but is an independent interest in real estate. Of course, it is most commonly created by way of security for a debt, but that fact does not at all affect its own constitution. For instance, the supposed debt may be no debt at all, the land-charge is still good. The debt may be paid off, the land-charge still subsists until cancelled. This independence of personal indebtedness is exemplified by the Prussian jurists by the use of a rather bold metaphor. They say the estate itself is the debtor; the landowner only acts for it as an attorney or agent in instituting the charge.

Peculiar incidents also attach to the document which embodies the land-charge. It is issued by the Registrar, and thenceforth has most of the properties of a bill of exchange. For instance, neither capital nor interest can be claimed without its production; payment to the holder is good payment, and when paid off, cancellation of the document should be insisted on, or else the landowner may have to pay again. A *bona fide* holder for value of the document can always enforce the claim against the owner of the estate. Land-charges can be made out payable to order, in which case they can be transferred by endorsement, which endorsement may be in blank, after which they pass by mere delivery until the blank is filled up. Coupons for future interest can be issued by the Registrar: these again are exactly like bills payable at the dates named on them.

The holder of the land-charge has all the remedies against the land that a mortgagee has. If a landowner wishes to discharge a land-charge, and cannot find the holder, he may pay in the amount to the Registrar, and have the charge removed from his title.

These charges are said to be very popular with business men, on account of their ready transferability, and absolute value (so far as the estate holds out). In a paper read before the London Institute of Bankers in April last, the writer took occasion to

allude to these charges, and the suggestion was received as one specially acceptable to bankers, who, the Chairman said, would be much more ready to take real security if it carried power to transfer at any moment.

The practical results of the Prussian Registry system are that parties habitually conduct sales and mortgages without legal assistance in the space of an hour, and for fees that are in many instances below even the Australian scale. A few of the fees charged are subjoined. The vendor pays no costs. A notary is only necessary where some complication is intended—such as that possession should not be given at once, or that part of the purchase money shall remain on mortgage, or the like.

Value of the Land or Amount of the Mortgage.	German Fees (these fees include all parties).			Compare English Fees for Sale or Mortgage (two parties only).
	Office Fee.		Notary's Fee (if one is employed).	
	Mortgage.	Sale.		
£ s.	£ s. d.	£ s. d.	£ s. d.	£
3 15	0 0 4½	0 0 9	0 0 9	6
30 0	0 3 2½	0 6 0		6
100 0	0 5 10	0 9 9		10
150 0	0 6 6	0 10 6	0 14 0	10
300 0	0 8 0	0 12 0		10
1000 0	0 14 7½	0 18 9	1 12 0	30
50000 0	37 15 0	37 19 0	2 10 0	340

The office fee includes (1) the making of an extract from the cadastral survey—a short verbal description of the property with a reference to its number on the public map. (2) Search of the register, and examination of the vendor's right to convey. (3) Drafting the instrument of sale—usually a short printed form—and completion of the transfer by entering in the register. (4) Notifying the sale to the Office of the cadastral survey. All this the registry officials do for the landowner without any extra charge. It appears nevertheless that there remains a surplus for the State after all working expenses have been paid.

The extent to which the small proprietors avail themselves of the facilities afforded by the registry may be judged from a specimen of a cancelled Prussian mortgage that the writer has in his possession. The mortgage is for £6: it is the nineteenth in order of priority. Five of the prior charges have been paid off, the remaining thirteen are all for odd amounts, varying from fifteen shillings up to £15. It may safely be said that *not one of these mortgages could have been made* in England except under circumstances so exceptional as to be quite outside practical consideration.

C. FORTESCUE BRICKDALE.

EVIDENCE IN CRIMINAL CASES OF SIMILAR BUT UNCONNECTED ACTS.

THE Supreme Court of New Zealand delivered in March last a judgment in a Crown case reserved for their consideration, in which they dealt with an interesting point in the law of evidence, and one on which the existing authorities are not very easy to explain or to reconcile. This is how far upon a charge of a specific crime evidence is admissible that the prisoner committed other crimes of a like nature by similar means. The question has usually arisen in trials for murder by poisoning, and this was the case in the present instance.

On the 11th of October, 1886, and several subsequent days, Thomas Hall and Margaret Graham Houston were tried for administering poison to Kate Emily Hall, the wife of the male prisoner, with intent to murder her. Houston was acquitted, but Hall was convicted and sentenced to penal servitude for life. Stated briefly, the case against Hall was as follows:—He was the active partner in a commission business, and his affairs, if not desperate, were in an involved state. There was very strong evidence that he had forged three promissory notes, which he had not the means of meeting. He had insured his wife's life for £6000, and she had made a will bequeathing her property to him. The pecuniary aspect of the case was summarized by the Attorney-General in his opening, by saying 'that by Mrs. Hall's death Hall would lose an income of about £250, and come into the immediate command of about £9000.' In June, 1886, Mrs. Hall was confined. For a few days she went on well, and then began to show symptoms of antimonial poisoning. Before and after the time that followed, Hall had made considerable purchases of antimony, colchicum, and atropia. He had frequent opportunities of administering poison. From the end of June to the 15th of August Mrs. Hall got continually worse, and at the end of that time analysis of her excretions showed that she had taken large quantities of antimony. On the 15th of August Hall was arrested. A considerable quantity of tartar emetic was found in his pockets, some of it being in a bottle, which he tried to throw into the fire. Tartar emetic contains thirty-six per cent. of antimony. As soon as Hall was arrested, all symptoms of antimonial poisoning in Mrs. Hall steadily diminished, and in a short time she entirely recovered. There was also some evidence that Hall had made preparations for burning down his house, which he had insured. The evidence against

Miss Houston was slight, and it is probable that she would never have been arrested or suspected if Hall's financial motives for desiring the death of his wife had been known to those who first discovered the crime.

On the 24th of January, 1887, Hall was again put upon his trial, being charged this time with the murder of Captain Henry Cain, the step-father of Mrs. Hall. Cain died on the 29th of January, 1886, that is nearly six months before the confinement of Mrs. Hall. He had been very ill for some time before his death, and the theory of the prosecution was that death was hastened by the administration of many doses of antimony, in different forms, and that the poison was administered by Hall. After Hall's conviction of the attempt to murder his wife, it was remembered that Cain before his death had been much troubled with vomiting, for which his known complaints did not satisfactorily account. Cain's body was exhumed, and considerable quantities of antimony were discovered in some of the vital organs, and Hall was consequently charged with the murder. There was, however, very little evidence against him of actual administration, and the counsel for the prosecution therefore tendered evidence that subsequently to Cain's death, while Hall and his wife were living together, Mrs. Hall had had antimony administered to her, and had in consequence shown symptoms to some extent resembling those which had preceded Cain's death. This evidence was accepted subject to a case being reserved, if necessary, as to its admissibility, and the Supreme Court, after hearing argument, ruled that the evidence was inadmissible, and quashed the conviction. The conviction certainly could not have been obtained without this evidence; indeed the case without it was so weak that it does not appear that the judge could have permitted it to go to the jury.

The substance of the admittedly relevant evidence was as follows:—Hall married Cain's step-daughter in May, 1885. Cain disapproved of the marriage, and he and Hall were at that time not on speaking terms. In October, 1885, they were reconciled, and from that time Hall was a frequent visitor at Cain's house. About June 1884, Cain, who was about seventy years old, had been seriously ill, and his doctor had attended him 'for general debility, feeble action of the heart, and senile gangrene.' From the latter cause he lost a toe, but he got better, and the gangrenous symptoms left him. In July 1885 he was taken ill again, and became very weak. Through August and September the doctor from time to time prescribed tonics, cough mixture, and diuretics. At this time he was more or less suffering from chronic bronchitis, from weakness of the heart, from some disease of the kidneys, concerning

which medical opinions differed as to whether it could properly be called Bright's disease or not, and from dropsy consequent on the kidney disease. Early in November—the reconciliation with Hall having taken place in October—the doctor prescribed ‘an effervescing mixture to relieve sickness probably.’ From the 19th of December to the 28th of January the doctor attended him daily with one exception, prescribing diuretics, stimulating mixtures, effervescing mixtures, and cough mixtures. From the end of December through January Cain was constantly sick, and, getting steadily worse, died on the 29th of January. The doctor certified disease of the kidneys and dropsy as the cause of death. During the last month of Cain's life Hall was in the habit of paying him short visits, generally twice a day, when he would usually see him alone. Cain suffered greatly from thirst. He had been accustomed for many years to drink whisky, but left it off about Christmas because it made him sick. After that he drank great quantities of champagne—one witness said that he would drink two quart bottles in the morning, and sometimes two more at night—as well as brandy and port wine. When his body was opened eight months after death it was found to contain a good deal of antimony, which he might probably have swallowed during the last few weeks of his life. Antimony was not contained in any of the medicines prescribed for him by his doctor. As in the previous trial, it was proved that Hall had had antimony in his pockets when he was arrested seven months after Cain's death, and had attempted to throw some of it into the fire. He asserted that he used it for making cigarettes which he smoked as treatment for asthma. The medical witnesses declared that they had never heard of such a use for antimony, that it would be of no use for such a purpose, and that some cigarettes of Hall's which they analysed contained no antimony. The doctors called for the prosecution were unanimous in the opinion that the administration of small doses of antimony to a person in Cain's condition of health would accelerate death by further depressing the already depressed vitality, and that it would be likely to cause vomiting. Two doctors called for the defence said that from what they heard of the symptoms and of the post-mortem they thought the death was the result of uremic poisoning, and that there was no reason to suppose that the administration of antimony had actually accelerated death. It was proved that Hall bought tartar emetic early in May 1885, that is about the time of his marriage, and five months before his reconciliation with Cain. He also bought atropia, or eye-drops consisting of a preparation of atropia, on the 20th of May and the 4th of November 1885, and on the 28th of January 1886 (the day before Cain died), and some

wine of colchicum on the 13th of November, 1885. It appeared that Hall had some horses and dogs which suffered at different times from sore eyes. There was also a circumstantial story told by a bookseller of Timaru, who said that in May 1885 Hall asked him for a book 'treating on the subject of antimony;' that he lent him Headland's *Action of Medicines*, which he bought, but subsequently returned with a few pages, including those about antimony, cut; that he afterwards bought a copy of Taylor on Poisons, and wrote on the fly-leaves at both ends. The book was produced at the trial, and bore at the beginning the inscription, 'T. Hall 1882,' and at the end 'T. Hall, Dunedin, 1882.' It is clear, however, from the report of the cross-examination, that this was not at all a satisfactory witness, and some of the witnesses for the defence thought they had seen the book in question in Hall's possession in 1883 and 1884. Inasmuch as several other persons besides Hall had access to Cain during the last months of his life, it is abundantly clear that this evidence by itself could not have justified a conviction.

The prosecution, therefore, gave, subject to objection and to the probability of a case being reserved, evidence of Mrs. Hall's symptoms in June, July, and August, 1886, of the discovery of large quantities of antimony in her excretions, of Hall's constant access to her, of her cure ensuing immediately upon his arrest, and of his purchases of tartar emetic in 1886 on June 18th and 26th and August 4th, of colchicum wine on July 5th, 17th, 31st, and August 11th, of atropia on June 3rd, of antimonial wine on June 12th, and of colchicum and tincture of colchicum on July 16th.

This evidence was of course objected to. Mr. Justice Williams ruled as follows:—'I think evidence would be admissible to show that some other person to whom the prisoner had access exhibited the same symptoms as Cain exhibited, and also to show that there was found in the excreta of such person the same substance as was found in Cain's body. I think the cases show that so far evidence is admissible. If, however, evidence is tendered to show that there was some motive for administering this drug to that other person, I confess to greater doubt.' No evidence to show motive for poisoning Mrs. Hall was given, but the evidence mentioned above concerning the attempt on her life was given. The jury found Hall guilty, and he was sentenced to death. The judge reserved the point as to whether the evidence of the symptoms of Mrs. Hall ought to have been given, and the Supreme Court quashed the conviction on the ground that it ought not.

The judgment of the Supreme Court is reported in full in the *Otago Daily Times*, 14 March, 1887. It deals *seriatim* with the three grounds on which counsel for the Crown had argued that the

evidence of matters connected with the attempt to murder Mrs. Hall was admissible. These were:—1. As evidence that the administration of antimony to Cain was not accidental. 2. As evidence of another part of the same transaction. 3. As evidence of what the symptoms of antimonial poisoning are.

1. *As evidence that the administration of antimony to Cain was not accidental.* The Court held that the admission of the evidence on this ground could not be justified, because there was no prior evidence of any weight that Hall was the person who administered antimony to Cain. The evidence of what happened the summer after Cain's death went to show less that the administration was intentional than that Hall was the person who administered. 'No general abstract question of danger or accident arose, as in the arson cases, which could be separable from and precede the particular and personal question, "Was the prisoner's act wilful?"' It is, indeed, difficult to imagine how a succession of small doses of antimony could have been given accidentally to an old gentleman who was very ill, whose diet was regulated by his doctor, and in whose medicines antimony was not prescribed. In this part of the case the Court had to consider the case of *Reg. v. Geering* (18 L.J., M.C., 215, 1849), and they seem to have been of opinion that though Chief Baron Pollock admitted such evidence as was given in Hall's case, he did not lay down a rule in sufficiently general terms to bind them. That case is generalized in Stephen's Digest of Evidence as follows (Art. 12, *Illustration (c)*):—

'The question is whether the administration of poison to *A* by *Z*, his wife, in September, 1848, was accidental or intentional.

'The facts that *B*, *C*, and *D* (*A*'s three sons) had the same poison administered to them in December 1848, March 1849, and April 1849, and that the meals of all four were prepared by *Z*, are deemed to be relevant, though *Z* was indicted separately for murdering *A*, *B*, and *C*, and attempting to murder *D*.'

The report of *Reg. v. Geering* does not state whether the unchallenged evidence pointed decisively to the guilt of the prisoner, or whether, as in Hall's case, it implied only that the poison was administered by one of several persons including the prisoner. The counsel for the Crown (one of whom reported the case) 'contended that the evidence was admissible for the purpose of proving, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died of poison, administered by some party; and secondly, that the evidence was admissible for the purpose of proving that the death of the deceased husband was not accidental.' The Chief Baron's ruling, as reported, is short enough to be given in full.

'I am of opinion that evidence is receivable that the death of three sons proceeded from the same cause, namely arsenic. The tendency of such evidence is to prove and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case, I think it wholly immaterial whether the death of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or create a suspicion of a subsequent felony. My brother Alderson concurs with me in thinking that the evidence ought to be received.'

If the Supreme Court had been prepared to go beyond the illustration in Stephen's Digest, and adopt as a binding authority the first sentence of this ruling, I think they would have been obliged to hold that the evidence of subsequent administration of antimony to Mrs. Hall when Hall had access to her, was relevant to the question whether he murdered Cain. As they held that evidence of this class could only be admitted on account of its relevancy to the question of accident or intention when there was evidence *aliunde* fixing the prisoner with the administration, I think they might have decided the point on the ground that the evidence of Hall's purchases of tartar emetic in June, July, and August, 1866, was clearly inadmissible, and the conviction therefore bad, unless the evidence could be admitted on some other principle. But if the doctrine of *Reg. v. Geering* and *Reg. v. Garner* is to be confined in this way, I do not see that such evidence can ever be admissible in cases like Hall's. If the poisoning was all done in one dose there might be a question of accident, as in cases of arson, but where it is in many doses it seems as if it must always be by design.

2. *As evidence of another part of the same transaction.* On this point the Court decided shortly that to make two poisonings part of the same transaction for the purpose of making one evidence of the other, they must be, in the words of Stephen's Digest (note vi) 'linked together by the chain of cause and effect in some assignable way.' Here there was clearly no such concatenation. There was some evidence that Hall expected Cain to leave money to his step-daughter, Mrs. Hall, but it was so slight that the prosecuting counsel was reduced in his reply to arguing that it did not matter what Hall's motive was, and even that he might not have had any, and might merely have conceived an idea that to poison some one would be an interesting experience.

3. *As evidence of what the symptoms of antimonial poisoning are.* On this ground too, the Court simply stated that the evidence was not receivable. It is perhaps enough to say, though the judgment does not, that by no possible reasoning could the fact that Hall bought antimony in May and June 1886 be construed as evidence of the symptoms of poisoning by antimony. There was plenty of medical evidence as to what the symptoms are, and it does not seem to matter much, if a man is proved to have taken antimony by the fact that it was found in his body, what the external symptoms of it are or are not.

It is an interesting question whether in this case the law is reasonable. The Supreme Court evidently thought not. They say, 'Viewed in the light of science, philosophy, or common sense, there is no doubt a nexus between the two events; the all but mortal illness of Mrs. Hall having been traced to antimony, administered by the prisoner in small doses, and the death of Captain Cain having also been traced to the same physical cause, it is, having regard to other circumstances, reasonable to infer that the human agency in both cases was the same.' Elsewhere they call the inadmissible evidence 'cogent evidence to the general mind,' and speak of the 'strong moral probability' of Hall's guilt. The law ought to be the means of ascertaining and expressing the just conclusions of science, philosophy, and common sense. If it does not, it is defective. The logical justification for excluding irrelevant evidence is that its admission would be a waste of time. If the evidence of the attempt to murder in July was not a reason why sensible men should think Hall guilty of murder in January, the jury ought not to have convicted him upon it, as they undoubtedly did. If it was, it ought to have been admissible. Practically I have no doubt that nineteen people out of twenty, upon a perusal of the whole story, would feel confident that Hall poisoned Cain. If they would be right, the law on the subject appears to be defective.

The judgment of the Supreme Court ends with a brief statement that they think the judge at the trial did right to reserve the point. This seems plain enough, but they give the astonishing reason that 'the English authorities state that no single judge could take upon himself the responsibility of declining evidence tendered by the Crown.' I am not acquainted with any such statement, but if it exists it is certain that single judges in this country constantly ignore it.

HERBERT STEPHEN.

PUBLIC MEETINGS AND PUBLIC ORDER.

IT has been thought desirable to obtain authentic information of the manner in which certain questions lately debated in this country are treated in other free constitutional states. Senator Tommaso Corsi has been so good as to furnish, as regards Italy, the information here given; and M. H. Lentz, who is at the head of the permanent staff of the Ministry of Justice at Brussels, will contribute to our next number a similar account as regards Belgium. We also hope to give accounts, on equally good authority, of the law and practice prevailing in the United States and in Switzerland.

I. ITALY.

The old Sardinian Penal Code, based on the French, is in force in the kingdom of Italy except as regards Tuscany, which had a later and more scientific Code, and has been allowed to retain it provisionally.

The draft of a Penal Code for the whole kingdom has been in preparation a long time, and is now published.

With regard to offences of resistance to public authority, we may generally distinguish mere *resistance* to any public authority in the exercise of its duties from *violence* offered to public officers, either to hinder them in the exercise of their duty or from personal malice. The Sardinian Code deals with both under art. 247.

'The offence of revolt (*ribellione*) is—

'1. Every assault and any and every resistance with acts of violence against public force [here follows an enumeration of several classes of public servants] when acting in the execution of the law of orders from public authority, or orders or sentences of a court of justice.

'2. Any violence or assault employed to dissolve the meeting of a deliberating assembly, to hinder the execution of a law, decision or sentence, or any regulation made by competent authority, or to obtain a decision or ordinance from the proper authority, or to avoid the performance of a duty ordered by such authority.'

If the revolt has been committed by more than ten persons, but without arms, the punishment is imprisonment with hard labour (*reclusione*). If with arms, penal servitude (*lavori forzati*) for the time fixed by the sentence.

The penalties are less when the persons engaged in the offence are fewer than ten; but six months' imprisonment is the minimum penalty unless the offenders are fewer than three and unarmed, in which case it is the maximum.

A meeting is considered armed when two or more persons openly carry arms.

If the weapons are concealed, the meeting is an *armed* revolt (artt. 248 to 252).

Art. 253:—‘The offence of revolt is committed where any armed meeting of not less than five, without having committed any acts of violence, conducts itself in a manner intended by means of intimidation to hinder the execution of such acts and regulations of executive, judicial or administrative authority as are mentioned in art. 247.’ The penalty is imprisonment for a term not less than two years.

It is an offence to take part in an assembly of five or more armed persons, or to refuse to disperse when lawfully required even if the meeting is unarmed.

Art. 255 of the Sardinian Code provides for assault and intimidation of public officers by workmen in public establishments, inmates of asylums, prisoners and persons under arrest.

Further, there is another series of articles (257 to 266) under which it is an offence punishable with *reclusione* to compel a public officer by threats or violence to do or abstain from doing any act in the course of his duty.

Intimidation and insult offered to jurymen are specially mentioned. Mere verbal insult offered to a public officer in the exercise of his duty is punishable with imprisonment up to a month or fine up to 200 fr.

Striking or wounding a public officer of the judicial or administrative service, or a juror in the exercise of his duties, or on account of the same (whether with or without a weapon, and whether or not appreciable bodily harm results), is punished with imprisonment of not less than a year; if the offence took place in a court of justice the punishment is the *maximum* of simple imprisonment (five years). In the case of a policeman or gendarme (*agente della forza pubblica*), such an assault on him is punished with imprisonment of one to six months. The penalties are increased in the event of serious bodily harm being inflicted.

The Tuscan Code deals with this kind of crimes with no less severity, though with better arranged and expressed provisions.

Art. 143. ‘§ 1. Whoever obstructs the execution of the laws, or of regulations made by public authority, by acts of violence against persons officially or specially charged with the execution of such laws or regulations, or against those persons who by their request aid them in the execution of such duty, is punished as guilty of resistance with imprisonment from six months to four years. § 2. Resistance is further punished with hard labour (*casa di forza*), (a) for three to ten years if it leads to grievous bodily harm,

and (b) from twelve to twenty if it leads to homicide without premeditation.'

Art. 144. '§ 1. Whoever offers violence to a person invested with public authority, while that person is in the exercise of his duty or otherwise in relation thereto, or of malice against such authority¹, is punished as guilty of public violence with imprisonment of one to six years. § 2. Public violence is further punished (a) with hard labour (*casa di forza*) from three to seven years if it caused slight bodily harm; (b) with the same penalty from seven to twenty years if it caused grievous bodily harm; (c) with penal servitude (*ergastolo*) if it caused homicide with premeditation.'

Art. 145. 'Whoever in any way has prompted a revolt or any public violence is punished as an instigator if the intended offence took place, and with imprisonment from one month to one year if it did not take place.'

As appears from these provisions, the public force in Italy is amply protected by laws which both cover every possible case of resistance to authority and impose penalties calculated to be seriously deterrent. In practice, too, these provisions are always strictly enforced by the Courts. In our criminal procedure there may be a written indictment, or a summary citation without indictment; in cases of *ribellione* the practice of summary citation prevails, as being more swift and exemplary. Again, our tribunals have not encouraged defences in the nature of excuse; they have not, for instance, allowed as an excuse provocation given by the officer assaulted, nor that the offender's immediate purpose was to escape from arrest, or to rescue a relative from it, and the like.

In the draft Penal Code which is under consideration the same offences, in substance, are provided for. The penalties are lighter, not from any intention of giving less importance to them, but because the new Code is in principle more lenient throughout than the existing ones, and the punishments for this class of crimes had to be diminished in the like proportion with others.

It is true that, in spite of the rigour of the laws, cases of riot do occur. The Italian populations, either by their southern temperament, or as having been but lately freed from despotic and unpopular governments, are prone to resist public officers; but, generally speaking, the punishment is prompt and certain, and has the general approval of enlightened men and friends of order.

TOMMASO CORSI.

¹ *Per semplice odio contro l'autorità*: I suppose this excludes offences arising from personal ill-will, and includes all those whose object is to bring public authority into contempt, or intimidate public officers generally or a class of them.—ED.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Della revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano. Studio esegetico di ENRICO SERAFINI, Professore di diritto romano nella università di Perugia. Vol. I. Pisa, 1887. Fr. Mariotti, 217 pp.

QUELS sont les moyens de droit que le Préteur romain mettait à la disposition des créanciers pour faire révoquer les actes frauduleux accomplis par leur débiteur? Cette question n'a pas cessé d'occuper les interprètes du droit romain depuis la renaissance jusqu'à nos jours; mais, malgré les nombreux travaux publiés sur la matière, le problème est loin d'être définitivement résolu. Certains auteurs affirment qu'il n'y a qu'une seule action révocatoire; d'autres en admettent deux. Et ce n'est pas tout: on se divise encore quand il s'agit de définir le caractère de ces actions. Ce n'est pas ici le lieu d'énumérer toutes les solutions proposées; il nous suffit de signaler ces nombreuses divergences d'opinions entre les auteurs.

Ce qui contribue le plus à obscurcir la question, c'est que les compilateurs du Digeste ont, comme on sait, supprimé les formules d'action dans les Commentaires sur l'Edit insérés dans leur recueil; or il est difficile de préciser le caractère d'une action en l'absence des éléments précieux fournis par la formule. Ajoutez à cela que les extraits des juriconsultes, loin de suppléer à cette lacune du Digeste, viennent au contraire augmenter l'obscurité en nous donnant des renseignements contradictoires ou confus. En effet ils sont inconciliables, si on veut les appliquer tous à une action unique, et, si on admet qu'il y a deux actions, il est bien difficile de dire quels sont les textes qui s'appliquent à l'une ou à l'autre.

Ni ces difficultés, ni les tentatives infructueuses de ses nombreux prédécesseurs n'ont arrêté M. Serafini. Il a pensé que si le problème n'a pas encore été résolu, c'est parce que les auteurs jusqu'ici ont suivi une mauvaise voie et il nous déclare qu'il s'est borné à interroger les sources sans prévention.

Deux textes d'Ulpien (L. 1 pr. et L. 10 pr. Dig. xlii. 8), rapportant les paroles même du Préteur relativement aux conditions d'exercice de l'action révocatoire, forment la base de ce travail. Ces deux fragments viseraient deux actions différentes que l'auteur désigne ainsi: action du premier et action du second édit. C'est à l'étude de la première de ces actions qu'est consacré le premier volume de l'ouvrage, le seul qui ait encore paru. La plus grande partie de ce volume a pour objet la réfutation des opinions émises par les principaux interprètes depuis les glossateurs jusqu'à notre époque. L'auteur y fait preuve d'une érudition aussi étendue que solide et d'un talent remarquable de dialecticien.

Après s'être tiré ainsi, à son honneur, de cette première partie de sa tâche, M. Serafini nous présente la solution qu'il veut substituer à celles qu'il vient de combattre. S'en tenant strictement au premier texte d'Ulpien (L. 1 pr. Dig. xlii. 8) pour déterminer le caractère propre de l'action du

premier édit, il arrive à cette conclusion que cette action, introduite par le prêteur peu de temps après la création de la *venditio bonorum*¹, est une *actio utilis, in rem arbitraria*, tendant à la révocation des actes accomplis par le débiteur postérieurement à la *missio in bona*. Il se fonde principalement, pour établir ce dernier point, sur ce que le texte d'Ulpien accorde cette action au *curator bonorum*; d'où il résulterait, d'après lui, qu'elle est intentée dans la période de l'envoi en possession et avant la *venditio bonorum*, car, à ce moment, le curateur a cessé ses fonctions.

Quant à l'action du second édit, bien qu'il ne doive en traiter que dans le second volume, l'auteur nous en donne, en passant, les principaux caractères. C'est l'action appelée *Pauliana*; elle est *in factum*; elle ne s'exerce qu'après la *venditio bonorum* pour faire révoquer les actes accomplis par le débiteur antérieurement à l'envoi en possession.

On peut voir dès maintenant quelle est la portée de la solution proposée par M. Serafini. Si l'on admet l'existence de ces deux actions, la conciliation pourra se faire entre des textes qui paraissaient contradictoires; c'est ainsi notamment que l'action révocatoire des Instituts (§ 6, *de actionibus*) ne serait autre que l'action du premier édit. Rien de plus simple d'ailleurs que d'admettre la coexistence de ces deux actions qui s'appliquent à des actes différents, accomplis dans des périodes distinctes, en un mot, qui se complètent l'une l'autre.

Assurément c'est là un système bien ingénieux. Malheureusement, comme les précédents, il me paraît soulever des objections auxquelles il est bien difficile de répondre d'une manière satisfaisante. Prenons par exemple l'action du premier édit, la seule qui ait été étudiée en détail par l'auteur. Si cette action n'est donnée que contre les actes du débiteur postérieurs à la *missio in bona*, on ne voit pas bien à quoi sert cette dernière mesure, ni en quoi ces actes diffèrent de ceux qui ont été accomplis antérieurement à la *missio*. Pour répondre à cette objection, M. Serafini a été obligé de soutenir, contrairement à l'opinion commune, que la *missio in bona* ne dessaisissait pas le débiteur, qu'elle ne conférait aux créanciers qu'un simple droit de garde.

Le mot *curatori* sur lequel repose toute cette théorie est-il d'ailleurs bien authentique? Il est permis d'en douter, car il ne se retrouve en cette matière dans aucun autre texte, et de plus on sait que Tribonien a substitué l'expression *curator* à celle de *magister*, qui n'avait plus de sens après la disparition de la *venditio bonorum*.

L'action du premier édit est-elle véritablement *in rem*? On pourrait citer, en sens contraire, certains textes, notamment le commentaire d'Ulpien lui-même qui forme la loi première². Enfin, s'il existe réellement deux actions révocatoires, pourquoi Justinien, aux Instituts, n'en cite-t-il qu'une seule?

Je ne puis entrer ici dans les discussions de textes, et je dois me borner à énumérer les principales objections que me suggère la nouvelle solution. J'ajoute que l'auteur en a prévu un certain nombre et a essayé d'y répondre. Il n'est que juste d'ailleurs, avant de porter un jugement définitif, d'attendre que l'œuvre soit terminée. Pour aujourd'hui, nous nous contenterons de

¹ À ce propos, je signalerai une petite inexactitude de l'auteur—la seule que j'aie relevée. Il cite (p. 78) la loi agraire de 643 qu'il appelle *Thoria*; or depuis la publication du 1^{er} volume du *Corpus inscript. lat.* on admet que ce n'est pas là le nom de la loi de 643 dont l'auteur est inconnu.

² L. 1, § 2: Ait ergo praetor, quae fraudationis causa erunt; haec verba generalia sunt et continent in se omnem omnino in fraudem factam alienationem vel quomoumque contractum.—Sive ergo rem alienavit, sive acceptilatione vel pacto aliquem liberavit.

signaler à l'attention des jurisconsultes ce travail consciencieux et intéressant qui contient un exposé critique, complet et clair, de tout ce qui a été écrit jusqu'à ce jour, dans tous les pays, sur cette importante question.

J.-B. MISPOULET.

Commentaries on 'The Transfer of Property Act, 1882.' By H. H. SHEPHARD and KENWORTHY BROWN. Madras: Higginbotham & Co. 1887. 8vo. lvi and 315 pp.

ONE result of codification in India has been the publication in various forms of the text of separate chapters of the Code, with explanatory notes or commentaries appended to each section. These productions are regarded with some disgust by those sanguine jurists who conceive a well-executed code to be such a simple and clear statement of the law that he who runs may read, and comprehend as he reads. They may, however, alleviate their disgust by the reflection that the Bible, the simplest of all codes, has been and is still made the subject of innumerable commentaries; is daily and weekly expounded by countless experts; and to this task of exposition and elucidation are devoted a great part of the teaching and learning of our Universities, and the life services of the members of an establishment maintained by the State for this special purpose.

A code is the statement in abstract language of abstract propositions of law; and, however admirable may have been the success of the draftsman in selecting clear and simple language to enunciate the will of the Legislature, anything like a complete comprehension of the full effect and operation of the code can only be realized by applying these abstract propositions to concrete examples. This has been perceived by modern codifiers, who in difficult or doubtful instances have resorted to the use of *Illustrations* introduced into the code itself. To the practising lawyer his daily experience is a living commentary of the best kind. To the student, who for the first time is making his acquaintance with a particular branch of law, the abstract propositions of a code are hard reading, devoid of that interest which must be excited in order to profitable study. A commentary is to the student a kind of necessity in order to give life to the dry bones. The value of a commentary must vary according as it is published, when the code has been recently enacted, or after the enacted code has been some time in operation and has been practically applied to the actual cases of the *forum*. At the former period, all that the commentator can profitably do is to place before the student in a concise and intelligible form the materials which the draftsman has selected to frame his code; to explain how they have been used; to raise him as far as is possible to the platform of vision occupied by the framer of the code. At the latter period the commentator can do more. He can further, as matter of sober history, narrate how the code has been understood and interpreted by the Courts, how it has been applied to actual concrete cases: and here the labours of the commentator may be most useful and time-saving, not to the student only, but also to the practising lawyer, the magistrate, and the judge. The chapter of the code which Messrs. Shephard and Brown have undertaken to explain was passed in 1882, and it came into operation the same year. Their commentaries, published five years after, have thus had the benefit of a whole *lustrum* to enable them to reap these latter advantages: and the commentators have industriously gathered all the fruit which these years have yielded. But unfortunately, owing to the time which cases take in reaching the superior Appellate Courts and being there decided, these useful materials have as yet been scanty.

No more important portion of the law of India has yet been codified than that embodied in the Transfer of Property Act. The object of this Act, as stated by its framers, was, *firstly*, to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the complement of the work commenced in framing the law of intestate and testamentary succession; and, *secondly*, to complete the code of contract law, so far as relates to immovable property. The Act deals with sales, mortgages, leases, exchanges, and gifts of immovable property, and with the transfer of actionable claims. In a country where fraud abounds to such an extent that English judges in India have had their judicial vision so far impaired as to become, in the language of their Lordships of the Privy Council, apt to see fraud everywhere—the habit being superinduced by the manifold cases of fraud with which they have to deal—no fraud has been more common than secret and underhand dealing with land. Under the *benami* system of the country secret and fraudulent conveyances were used to cheat creditors, to deceive purchasers. Honesty and morality were destroyed by fraudulent dealing; and progress and prosperity were retarded in consequence of the insecurity of title to real property. In 1864 a partial remedy for this state of things was attempted by the passing of a Registration Act. This Act rendered compulsory the registration of all documents dealing with immovable property of the value of one hundred rupees (about £7) or more, the penalty for non-registration being that no Court could give effect to the unregistered document. In the case of documents dealing with property of less value registration was left optional, but was encouraged by making a registered document prevail over an unregistered document relating to the same property—a provision intended to prevent fraud, which the astute Asiatic promptly utilized for the perpetration of fraud by selling or mortgaging his property once by an unregistered document and a second time by a registered document. This law¹, however, only provided for the

¹ The Indian Registration Acts provide merely for the registration of *assurances*, not for the registration of *title*. The essential benefit of this system of registration is to supply proof that a document was in existence at a certain point of time and was not therefore fabricated afterwards—a piece of evidence by no means unimportant in India. As a record of past dealings with real property to assist the investigation of title, the registers have been little used (except perhaps in the Presidency-towns), for the obvious reason that they supplied no information as to *unwritten* transactions, which before the passing of the Transfer of Property Act were possible, legal, and common. During the year 1885-6 the Registration Department in India yielded a net surplus to the State of Rs. 1,215,930 (about £91,194), a profit upon supplying the Courts with the above species of proof. A Register of Title as complete as that to be found in Australia, or in any country of the continent of Europe, was possible in India. The land pays revenue to Government as a rule; and there are in the public offices of Government complete registers of all estates (1) paying *revenue*, and (2) exempted from paying *revenue*. In the offices of the estate-owners, who are proprietors subject to the payment of this revenue, there are similar registers of subordinate estates and holdings paying *rent*. All transfers are entered therein with scrupulous accuracy. Nothing would have been easier than to utilize these registers for the purpose of *registration of title*, and this course was strongly pressed upon the Government by the present reviewer, but other counsels prevailed. The utility of the course so advocated and its acceptableness to the native community (a consideration too often not sufficiently regarded in legislating for India) are shown by what has since taken place in the Madras Presidency, as told in the following extract from the *Statement exhibiting the Moral and Material Progress and Condition of India during the year 1885-6*:—‘A great convenience has been effected by allowing parties registering documents relating to landed property to apply to the registration officer to have the transfer of the land noted at the same time in the registry which is kept for revenue purposes.’ And the profit to the State has been materially increased in this Presidency by meeting in this way the wants of the native community.

registration of the written instrument, when the parties had committed the transaction to writing, and such an instrument was therefore in existence. But writing was not then made, nor had it previously been, necessary for any transaction affecting real property in India. In 1882 for the first time the Transfer of Property Act—which may therefore be termed the Indian Statute of Frauds—made writing necessary for sales, mortgages, and exchanges of immovable property of the value of one hundred rupees or upwards; and such writing must be registered. Where the property is of less value than one hundred rupees, there must be a registered writing, or *delivery* of the property. A registered instrument is also made necessary for leases from year to year, or for any term exceeding one year or reserving a yearly rent: and a gift—that oft-used weapon of *benami* fraud—can be made effectual as to immovable property only by a registered instrument attested by at least two witnesses. If we were reviewing the work of the Indian legislature instead of that of Messrs. Shephard and Brown we would say that these provisions are wise and excellent. As to the work of the commentators, we have to observe that sufficient point is not given, for the benefit of the student, to these changes, regard being had to the former state of the law and its baneful influences upon litigation.

The law of real property in England is an intricate and difficult subject for a student to master, even with the help of the excellent text-books which are available to assist his studies. The law of real property in India is quite as intricate and difficult, and the same excellent assistance is not available. It is mixed up with, and to be extracted from, the revenue systems which vary in each Presidency and within the same Presidency; and these systems can be mastered only by wading through much irrelevant matter, past and present. Any book therefore which would, at once exhaustively and satisfactorily, deal with the Transfer of Real Property in India, must be the work of long labours varied in each Presidency (there is no High Court for the whole of India, each Presidency has its own) and matured by study and experience. Messrs. Shephard and Brown, whose practice and experience extend to the Madras Presidency only, could scarcely have been expected to produce such a work. Their concrete cases are, as might have been expected, drawn rather from English reports than from Indian cases. Nevertheless, there is a great deal of very useful matter in their Commentaries, and no student of the Transfer of Property Act will rise from their perusal without having clearer ideas of the object and scope of the Act. Where the commentators attempt to anticipate the operation of the Act upon future cases they are not always quite successful; and in our view this fore-judgment of possible cases, unoccurred and unargued, might well be omitted in such a commentary, which would better explain the text of the law from the standpoint of what has been done in the past.

We may notice an obvious error at page 137, where it is laid down that, if a money decree merely is taken for a mortgage debt, the mortgagee is under the Act precluded from executing it by attachment of the mortgaged property—reference being made to section 99. Now section 99 does not preclude from *executing* such a decree by *attachment* of the mortgaged property: it precludes merely from *bringing such property to sale* otherwise than by instituting a suit under section 67. This is the only positive error which we have noticed in the book, and it will doubtless be rectified in a future edition. Apart from these criticisms, the work is creditable to the industry and learning of its authors, and is a useful addition to the Indian Law Library.

C. D. F.

Französisches und Englisches Handelsrecht im Anschluss an das Allgemeine Deutsche Handelsgesetzbuch. Von W. SPÄING, Amtsrichter in Berlin. Berlin: Franz Vahlen. 1888. 8vo. viii and 538 pp.

THIS book is intended to give a survey of French and English mercantile law to German readers. The method adopted is that of starting from the text of the German Mercantile Code, and of adding a statement of the foreign law after each section—the part relating to maritime law being omitted. We do not think that this is a good plan; no two systems of law can be properly worked into the same scheme, and a system of such irregular growth as our own is least fitted to be forced into an artificial symmetry of this nature. Moreover, the German Code is by no means an exhaustive statement of the law on the subjects with which it deals; it is a system of rules which, in the cases in which it is applied, either overrides or complements the ordinary law, and nobody can understand it to whom that ordinary law is unknown. If the English law is arranged according to the same scheme, the reader who starts without any previous information must be necessarily left in the dark as to many important and fundamental principles. Another difficulty arises from the fact that the juxtaposition of a codified and an uncodified system necessitates a precision of form in the exposition of the latter, which, unless supported by ample authority, is unnatural and delusive.

If we except this fault of arrangement, we may say that Mr. Späing has succeeded fairly well. He gives a good deal of matter, and has, on the whole, been discriminating in the selection of the text-books from which he derives his knowledge; some of the statutes are translated in *extenso*, and the translations are done with care and judgment. If we have to dwell on the faults of the book, it is not because we fail to recognise its merits, but because we think that it might be remodelled, so as to become a valuable help to a large class of readers.

We have said that no two systems of law can be properly worked into the same scheme. One of the chief reasons for this is due to the circumstance, that, owing to historical and local causes, some parts of every system require much more elaboration than the corresponding parts of another body of law. In Germany, for instance, it is of great importance to know whether a given set of facts is governed by the mercantile or by the general law. Hence the necessity for a strict definition of the characteristics of traders and of trading transactions. There is a string of rules on that subject in the German Code, and as something had to be said about England, Mr. Späing has been at some pains to find corresponding ones in English text-books, or to deduce them by analogy or otherwise. The result is misleading, because the rules thus given are vague and pointless; but more so, because the reader necessarily thinks that they must have some practical application, which, as regards a great many of them, is not the case. Again, a large proportion of the provisions of the German Code is put in for the purpose of modifying the ordinary law in the cases to which the Code applies. Here also the parallel rules of English law are given, and the reader has to find out for himself whether they also are exceptions from the ordinary law, or whether they are general statements of the whole law. While thus, on the one hand, places which in reality are vacant in our system are filled up with a view to symmetry of arrangement, we find, on the other hand, that doctrines, which are of the highest importance in English law, are left out, either because in Germany they belong to the general law, which a reader of the mercantile code is supposed to know, or because

the German law has no room for them. We have looked in vain for the distinction between simple contracts and contracts under seal, for the doctrine of consideration and other material parts of the English law of contracts; the difference between executed and executory sales is not explained; the law of agency is dealt with in connection with a very narrow branch of it in the German law; the important class of trading corporations, which are not registered under the Companies Act, is left out in the enumeration of mercantile associations; and other similar omissions occur.

These are faults of arrangement which are almost inevitable consequences of the method adopted; but the book is not free from mistakes, which a careful writer like Mr. Späing might have avoided. What is said on page 7 about the contracts of infants is by no means correct, and it is also inaccurate to say that an infant cannot be a trader. The whole subject of the capacity of married woman (pp. 8-13) is not properly understood; the statement on page 10, '*in the City of London, a married woman may be a trader with the consent of her husband,*' would be just as correct if the words printed in italics had been left out. In saying on page 35 that in English law there are no provisions enjoining a trader to keep books, the author overlooks § 28 (3) of the Bankruptcy Act. It is not correct to say that partnership property cannot be taken in execution for the purpose of enforcing a judgment against a partner (p. 107); nor is there any justification for the statement, that the notice to discontinue a partnership of undetermined duration must not be given at an inappropriate time (*zur Unzeit*, p. 112). What is said on page 401 about contracts for the sale of goods of a lower price than £10, implies that, apart from the exceptions there stated, these contracts must be in writing, which is of course quite wrong. It is also incorrect to say that a 'Spediteur' (forwarding agent) is considered a common carrier (p. 477). It is not true in fact that in deeds of transfer relating to shares in registered companies the buyer's name is usually left in blank (p. 297); and if a buyer, for the sake of avoiding the stamp duty on a re-sale, has a transfer made out in this form, he incurs considerable risk. The definition of negotiable instruments as 'documents relating to a sum of money payable to order or bearer' (p. 368) entirely misses the essential point.

We do not wish to lay too much stress on these and other errors which occur in the book, because there is a good deal of solid work by the side of them. A book of this sort was much wanted in Germany, and the author may, therefore, look forward to bringing out a second edition. In that case we should suggest that the statement of the foreign law should not follow the sections of the Code, but that a systematic exposition of the whole law on each subject should be given at the end of the division relating to it, and we should further suggest a careful revision of the matter itself. If this be done, Mr. Späing will produce a very useful book. E. S.

Outlines of International Law, with an account of its origin and sources and of its historical development. By GEORGE B. DAVIS, U.S.A., Assistant Professor of Law at the U.S. Military Academy. London: Sampson Low, Marston, Searle, and Rivington. 1888. 8vo. xxiv and 469 pp.

It is a pious opinion that no sermon is preached which someone may not be the better for hearing; and it may be plausibly maintained that a new book, however slightly it may differ from its predecessors on the same subject, is probably, in some respect or other, an improvement upon them. On reading Mr. Davis's early chapters, we were disposed to think that only

on some such principle could the appearance of his book be justified. The writing struck us as that of an industrious amateur, with access to a fairly good library. These chapters are indeed a cento of truisms culled from respectable authorities, varied by alarming lapses into errors more or less original. What is one to think of a writer who informs us that Private International Law is 'that branch of the science which has to do with the relations of States to the citizens or subjects of other States'; who implies that the rights of neutrals are discussed in several of the early maritime codes; who thinks that certain treaty provisions warrant the inference 'that a period of residence is a necessary preliminary to a change of national allegiance'; who alludes to Roman law as 'the most complete and elaborate code of law that has ever existed'; who says that the Baltic 'is acknowledged to be a closed sea'; whose information as to the navigation of the Danube ends with the year 1871; who represents the Declaration of Paris as restraining 'the States who were parties to it from capturing private property at sea, except enemy goods in enemy ships and contraband of war'; who attributes to 'Abbot' Mr. Lawrence's *Essays on Modern International Law*; who speaks of 'Sir Montague Bernard' and 'Solicitor-General Layard'?

The fact is that Mr. Davis has not adequately mastered the topics dealt with in the first half of his volume. The latter half is much more satisfactory. The account of war and prize law, though slight, is a good straightforward piece of writing, interspersed here and there with passages of practical importance, e.g. the remarks (p. 225) on the employment of chain-shot, and (p. 344) on the new doctrines asserted during the American Civil War with reference to Contraband and Blockade. T. E. H.

A Treatise on the Law of Stock and Stockholders. By WILLIAM W. COOK. New York: Baker, Voorhis & Co. 1887. La. 8vo. xciv and 787 pp.

THE great development of business corporations in America, and the consequent growth of the law which governs them, has produced quite a crop of text-books in that country. Not only has the number of treatises professing to deal with the whole of the law of private corporations been increased of late years, but particular branches of that law have been made the subject of special study, and have been treated in separate books. Of these the latest is Cook's *Law of Stock and Stockholders*, which, as its name indicates, attempts to consider all the rights and liabilities of owners of the shares or stock of such corporations. In reading it one cannot fail to be struck by the readiness with which the Common Law conception of a corporation has adapted itself to the wants of the business community and to the demands of the stock exchange. The desire for investments, easily transferable and free from personal liability, has been more easily satisfied by means of the form of a corporation than through the more cumbersome machinery of a joint-stock company; and it is for this reason, perhaps, that certain branches of the law of the stock exchange have been far more fully developed in America where the corporation has flourished, than in England where the modern limited company has been evolved from the partnership. The certificate, for example, which is issued to a shareholder by the company, and is commonly used by him in transferring his shares, has received very little attention in England, while it has given rise to a great deal of litigation on the other side of the water. It is there settled by a long line of decisions that a corporation which registers a transfer of stock without

the surrender of the outstanding certificate renders itself liable to a *bona fide* purchaser who held this certificate at the time of the transfer complained of, or who bought the stock on the faith of that certificate afterwards. This applies to all corporations, at least when there is a rule by statute, charter, or bye-law (and there is always such a rule), forbidding the registry of a transfer without a return of the certificate; and it is true in all cases where the transfer improperly registered is voluntary, that is where it is not a transfer by reason of attachment, execution, bankruptcy, or the like. The same question was recently raised in the case of *Société Générale de Paris v. Walker*, 11 App. Cas. 20, and the House of Lords seems to have been inclined to take the view of the law which has been maintained in America, but as yet no case in England has called for a direct decision in the matter. It is curious that the case just cited involves another point still undetermined in the English courts, but long settled in America, and that is the liability of a company which registers a transfer of shares by a trustee after notice that the transfer is a breach of trust. In America the company is liable in such a case to the *cestui que trust*, but in England the question does not seem to be quite free from doubt in spite of the provisions of the Act of 1862. *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424. The same case on appeal under the name of *Société Générale de Paris v. Walker* supra. See also *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

The arrangement of Mr. Cook's treatise is not as systematic as could be desired, owing, perhaps, to a fact which he mentions in the preface. His book, he says, is not 'the result of a preconceived idea as to the scope, divisions, and limits of the subject. The subject itself, its extent and plan, has been a matter of growth in the author's mind.' Mr. Cook has to some extent a fault which is unfortunately very common among American text-writers. He sometimes states a proposition of law, citing the authorities by which it is established, and then a little further on states another inconsistent proposition, and cites the authorities which support it, without attempting to reconcile the statements, or even pointing out to the reader that they are contradictory. Mr. Cook's attempt to summarize certain parts of the law is unusually successful, and his Chapter XXIII ('Rules for corporations in regard to refusing or allowing registries of transfers of stock') and Chapter XXIV b ('Dangers incurred in purchasing stock'), are, perhaps, the best part of the book. The first of these chapters is, indeed, extraordinarily clear, concise, and accurate. A. L. L.

Zur Reform des deutschen Strafen- und Gefängniswesens. VON DR. P. F. ASCHROTT. Berlin and Leipzig: J. Guttentag. 1887. 8vo. 50 pp.

THIS is in the nature of a sequel to Dr. Aschrott's exhaustive work on the English penal system (L. Q. R. iii. 353). He calls attention to points in which he thinks Germany has something to learn from England. The chief of these are the wide range of judicial discretion, which in Germany is stated to be too much narrowed by minimum penalties; the graduation of prison regimen in the successive periods of working out a sentence, and the different forms of imprisonment (the nominally distinct punishments of the German Penal Code are in practice so ill defined that *Zuchthaus* in one place may be less severe than *Gefängnis* in another); the employment of convicts on productive work (the unproductive 'hard labour' of our system is on the other hand not approved); the preventive treatment of juvenile crime by means of reformatory and industrial schools; and the practice of requiring securities of the peace, in fitting cases, as a partial or total sub-

stitute for actual punishment. Assistance, public and private, to discharged prisoners is also strongly commended.

It is satisfactory to know that, if the substance of our criminal law is still worse expressed than any body of law of similar importance in any foreign system, the working and administration of it are found worthy not only of study but of imitation by a Continental critic so competent and well informed as Dr. Aschrott.

F. P.

A Manual of the Criminal Procedure (Scotland) Act, 1887. By NORMAN DORAN MACDONALD. Revised by THE LORD ADVOCATE. Edinburgh: William Blackwood & Sons. 1887. 8vo. vi and 103 pp.

THIS Act does not, as the author observes, change the general principles of the criminal law of Scotland. It deals chiefly with the mode of conducting proceedings; but it does make certain changes in principle, chiefly directed to stopping the loopholes through which old offenders used to find comparative safety in entering upon new fields of crime. In this Manual these changes are briefly enumerated; and then are set forth in order the changes made by the Act at the various stages of procedure. A feature of the book is the comparison of the old and new forms of Indictment, the latter being picked out of the former by taking the words printed in capitals. The Indictment in a well-known case of poisoning is taken as an example, and the form, consisting of nearly eight hundred words setting forth with much elaboration details which the prosecutor does not know, is cut down to a hundred words setting forth the essentials which he does know, and which sufficiently inform the prisoner of the charge made against him.

The body of the Manual, consisting of forty-four pages, gives to any one fairly acquainted with the old procedure a clear account of the new. There are indeed many technical expressions, not understood of the people in England; but the English reader may at least infer from a perusal of the Manual that the Scotch enjoy, clad in native garb, a very effective, and now very simple, criminal procedure.

The rest of the volume consists of a print of the Act, and a neat and sufficient index.

R. C.

Le Gouvernement et le Parlement Britanniques. LE C^{TE} DE FRANQUEVILLE. Three vols. Paris: J. Rothschild. 8vo. 595, 567, and 575 pp.

MONSIEUR DE FRANQUEVILLE's elaborate treatise on the Government and Parliament of Great Britain is not a book to be dismissed in a curt note. It is a production which deserves a lengthy review, and we hope at some future day to lay before our readers a careful estimate of the results obtained by a Frenchman of eminence from a new and most painstaking study of English institutions. At the present moment, however, we can do no more than direct their attention to three features of De Franqueville's work, which are specially deserving of notice.

Le Gouvernement et le Parlement Britanniques is, like the essay of Monsieur Boutmy's, noticed not long ago in the pages of this REVIEW, at once the sign and the result of a remarkable movement in French thought. The energy of the French intellect shows itself now, as it has shown itself time after time at past crises of French history, to be irrepressible. You cannot read a line written by one of the modern school of French constitutionalists without seeing that speculation on political matters has taken in France a new and a most happy turn. *A priori* dogmatism has given place to historical research. Constitutional theories, and especially the constitutional theories

embodied in the Constitution of England, are studied in a new spirit. The new school look for facts, and not for dogmas, and the lucid intellect of Frenchmen when once turned towards the acquisition of positive knowledge is certain to find the knowledge which it desires. The time is perhaps not far distant when the working of the British Constitution will be far better known in France than it is in England, and be far more clearly explained in France than it is in Germany.

Monsieur De Franqueville, in common with the school to which he belongs, aims at grasping at once the history and the actual working of British institutions. He shows in each of his chapters how a given part of the Constitution, say the Crown, came to be what it is, and what it is which it has at last come to be. This double mode of treatment has great advantages; it guards the writer who adopts it against many errors; it keeps before his own mind, and the minds of his readers, the fact that every part of the English government is the product of a long and a very peculiar course of historical development. And we doubt whether there is any feature in our author's work which will commend itself more to students than this combination of the historical and the analytical method of treating his subject.

While, however, we fully acknowledge the great advantages of the course which Monsieur De Franqueville has adopted, we venture to doubt whether it will not be found that here as in other cases an author's strength is singularly connected with his weakness. The effort to trace the course by which an institution has developed, and at the same time to explain the way in which it actually works, is apt to result in an incomplete historical sketch, followed by an equally incomplete analysis of the institution as it actually exists. Monsieur De Franqueville's pages occasionally suggest the idea that his book would have gained something had it formed two distinctly separate works, of which the one should have contained the history of the English Constitution, and the other should have displayed a picture of English institutions as they actually exhibit themselves to a foreign observer who studies England in the last quarter of the nineteenth century. The work of Hallam and the work of Bagehot is equally above praise; an attempt to combine the work of Hallam and the work of Bagehot is one of extreme difficulty, and can hardly attain such complete success as the success attained by each of these eminent authors. It is, however, both unfair and unwise to dwell much on the fact that the scheme on which Monsieur De Franqueville has worked cannot have all the advantages, as it has of course not all the disadvantages, of a different mode of treating his subject. What we ought to dwell upon is the fact that a new and most instructive picture of the British Constitution has been drawn by a man whose learning and talent enable him to throw new and valuable light on a subject which from one generation after another has engrossed the attention of political thinkers.

A. V. D.

Commons and Common-fields; or, the history and policy of the Laws relating to Commons and Enclosures in England, being the Yorke Prize Essay of the University of Cambridge for the year 1886. By T. E. SCRUTTON. Cambridge University Press. 1887. 8vo. viii and 180 pp.

THIS essay is of twofold bearing; it not only endeavours to trace the early history of commons and common-rights, but also deals with the modern law and its aims. The author in the latter part of his treatise gives a good sketch of the progress of inclosure under successive economical conditions, and discourses upon the advantages and disadvantages of each step taken against the 'champion,' as Tusser calls it. The student of economic

history will find a good deal of suggestive detail in the chapter relating to the inclosures for the sake of sheep-farming and deer-keeping, which were so manfully opposed by Latimer and Kett, and in that which tells of the hopes roused by the Levellers, which induced English peasants, during the civil wars, like the Spanish labourers of our own day, to attempt to cultivate under new conditions part of the vast mass of waste land that lay open to them. The story of the reclamation of the fens and the legal and illegal controversies it involved is also touched on. Mr. Scrutton goes on to handle the modern legislation of the subject, and the preservation of open spaces as public property. He is in favour of the proposal, once put forth by Sir William Harcourt, to make *illegal inclosures public nuisances*, as the best means of securing commons from the greed or folly of those who would publicly or privily go about to destroy them. But, fearing possibly the manifold difficulties which lie in the way of the heroic legislator, he suggests what certainly appears a more practical way, to wit, that the Inclosure Commissioners should have power to investigate, prosecute, abate or proceed civilly in the matter of illegal improvement. That some such measure is needful will be conceded by most students of the subject.

But it is with the earlier section of the essay (part of which has already appeared in this REVIEW) that the reader will more probably be interested. If it cannot be admitted that Mr. Scrutton has solved the difficult problems that his subject presents, yet inasmuch as he has put some of the chief perplexities in a clear light, and removed from the way some of the obstacles that have blocked it for long years, he certainly deserves the gratitude of those that follow him. The fact is, there is not at present before us the material for settling the history of the early land law in England. We English students need the help which a thorough knowledge of other medieval systems would almost certainly give, as well as more detailed information on the more primitive customs of English manors. Still it is a step forward to have got rid of the confusing terms *appendant* and *appurtenant* by a definite historical explanation of their origin, one of Mr. Scrutton's best bits of research; and it is a happy piece of conjecture that led to the comparison of Glanvil's well-known statement (drawn from the practice of his day, as proved by several town charters), as to the villein's year and day undisturbed in a privileged place giving him freedom, with the Salic law *de migrantibus*. The definition of the *vill* as the township, and the *manerium* as the holding of the lord, whether one vill or more, is also useful for the eleventh century. The interpretation of the passages in Domesday as to the 'commodation of judices' in the light of the lawyers' rule that 'a manor must have a court' is neat and ingenious. The author rightly separates the Dena-lagu from the rest of England, in considering the state of land-tenure in the eleventh century, though he perhaps underrates the effect of the Danish wars upon the South of England, where, as contemporary authority witnesses, many men were obliged to give up land and stock to their richer neighbours for food and seed-corn, taking them back on conditions favourable to their creditors, a process which would probably account for the extinction of the smaller holders of *ethel* in Wessex and West Mercia. And looking at the evidence at our disposal, it does not seem likely that there was ever in England before the coming of the Danes a very large class of such *libere tenentes*.

The land law in England, like that in India, has had to stand the strain of a succession of different theories, each in turn warmly maintained. It is interesting to find Mr. Scrutton upholding the Court in the case of *Earl Dunraven v. Llewellyn* against Williams on the ground that the 'legal

theory' of the origin of rights of common is on the whole more near to the historic truth than the so-called 'historic theory' of the German school. That the legal theory is, at all events, the best working theory, both sides would probably admit.

It is hardly possible to peruse Mr. Scrutton's suggestive and interesting essay without being struck first with the immense value of the Year Books in nearly every disputed point of theory and practice touched on and marvelling at the long neglect in which they have lain, and secondly without seeing the need for a careful study of that curious process of 'crystallization' which went on in the English law under the influence of the great Elizabethan and Jacobean lawyers, the results of which have long been suffered to obscure our English legal history.

F. Y. P.

Outlines of the Science of Jurisprudence. An Introduction to the Systematic Study of Law. Translated and Edited from the Juristic Encyclopaedias of Puchta, Friedländer, Falck, and Ahrens, by W. HASTIE. Edinburgh: T. and T. Clark. 1887. 8vo. xliii and 278 pp.

IN the words of the author's preface, this work 'is an attempt to bring the best available thought and experience of the Masters of the Modern German Jurisprudence to bear upon the acknowledged want of a more scientific and systematic discipline in the study of law in England;' and elsewhere he describes it as 'an elementary contribution to the desideratum of a more scientific Legal Education, based upon earnest conviction of the essential relation of Theory to Practice, and dealing with the existing want at that initial and vital stage in which the conditions of all real progress and attainment are cardinally determined.' But it is not only the methods of legal education that Mr. Hastie wishes to reform; instruction in a science depends upon the state of the science itself, and with us this is found to be sadly deficient. For its restoration three things are necessary, 'a true Philosophy, a living Science, and a reanimated History of Law.' It is to effect a reform in regard to the first two points that these translations have been published. The importance of the last has already been fully recognised.

In order to clear the ground, Mr. Hastie comments at some length on the discredit which has fallen upon Bentham's principle of utility as a test of legislation, and upon Austin's conception of sovereignty as the source of law and so of rights. The former is 'contradictory of the great modern principle of Political Equality;' the latter makes 'all law the creation of arbitrary will.' Hence he would revert to the idea of a principle of Right which is implanted in the common consciousness of a people, and which is already the guarantee of natural rights before the State has been formed to take them under its protection. This he regards as giving us once more a true Philosophy of Law. As to the other point, the living Science, he wishes to introduce the German notion of Law (or Right) as a living organism, raised from a barren collection of isolated rules into a system animated by one spirit, and composed of parts each of which has its own proper function to perform, while it works in due harmony with the whole. Such then are Mr. Hastie's objects; the revival of a true Philosophy of Law by substituting the German principle of Right for the Austinian Sovereign, and the quickening of the Science of Law by presenting it as a living systematic whole. To carry these out he furnishes us with translations of certain brief Juristic Encyclopaedias and works on Juristic Methodology, i. e. on the systematic arrangement of legal study, altogether five in number. Of these the

most interesting is the Juristic Encyclopaedia of Puchta, entitled 'Outlines of Jurisprudence as the Science of Right;' and we may also notice Falck's 'Scientific Study of Jurisprudence; its Preliminaries, Special Subjects, Means, and Appliances.' Of course it would be beyond our purpose here to enter into a discussion of these works; the only question that concerns us is whether they are fitted to exercise that influence upon legal education in England which the translator claims for them.

We admit fully the interest which they have for the student of the Philosophy of Law, and we admire the ability and enthusiasm which Mr. Hastie has brought to his task, but we think that the ordinary student of Jurisprudence will find in them more to confuse than to help him. It has been plausibly maintained indeed that the Philosophy of Law is outside the sphere of Jurisprudence proper, and that when the jurist has discovered what laws the Courts will enforce, he has got all that is necessary for his purpose. It is, at any rate, very probable that Jurisprudence would have made greater advances of recent years had not Austin given such undue predominance to his discussion of the nature of positive law. Such a discussion is proper enough in its right place, but the course of legal education in England will hardly be facilitated by the introduction of another Philosophy of Law, as erroneous in some respects as Austin's, and which demands from the English student a complete reversal of his present notions. And since Mr. Hastie purports to give us the best available thought of Modern German Jurisprudence, he surely ought to have recognized that Puchta wrote even before Austin, and that an approximation to English notions has been made since his time by Ihering, who, in his *Der Zweck im Recht*, has applied some of the necessary corrections to Austin's theory, and in particular has shown that it is an essential element in Law that the sovereign should himself be bound by it. It is a great mistake to go back from this to Puchta's disquisitions upon Freedom as being the leading element in Right, and upon the subordinate position taken by Reason, which may determine it indeed, having regard to the necessary limitations set to human affairs, but which does not originate it. Jurisprudence is here conditioned by language in a way quite peculiar to itself, and while these notions may be natural to a German who regards it as the Science of Right, yet they give no help to the English student who looks upon it as the Science of Law; and however needful they may be for the study of the Philosophy of Law generally, yet to incorporate them as a necessary part of legal education is simply to introduce a somewhat unreal discussion, and to divert attention from the vast and deeply interesting fields of Jurisprudence proper, including as they do both the contents of the law and its history.

And if we consider the other point on which Mr. Hastie lays so much stress, while we may acknowledge that he has emphasized a defect in our legal system, yet the actual value of his remedy may again be doubted. This conception of Law as a living organism, or, to put it on its highest level, as 'an objective organism of human freedom,' to what does it amount in the hands of the writers whose works are here presented to us? Little more, it must be confessed, than to a logical arrangement of the whole law, and a general survey of its several parts, each being compared with the actual relations of human life that no gap in the law may be left. We are given to understand indeed that the great merit of the system lies in its choice of *legal relations* as the material to work upon instead of the *rights* which are incident to them. But upon examination it will be found that this merely helps us to the ordinary division of law into private and public law, with a subdivision of the former into individual law, including property

and obligations, and of the latter into administrative law and international law. With this the function of legal relations, of which so much is said, seem to end, and even Puchta admits that the idea fails us in following out the complexities of the details of law, and that the separate rights must then be treated of directly. It appears, therefore, that the notions which Mr. Hastie wishes to introduce have little practical effect, while their tendency is certainly to add confusion to the student's already sufficiently confused notions of Jurisprudence, and in a manner quite unnecessary. The argument of the Germans is that all law supposes relations between persons, and that a mere right, such as a right over a thing, does not recognize this. But it must be noticed that Austin has given us a far better analysis of rights than any to be found in Puchta and writers of his school, and that this does expressly recognize that every right supposes a relation between two persons, the person of inherence and the person of incidence, and that a right over a thing, or a real right, is simply one in which the person of incidence includes all men generally.

There is no doubt that the Science of Law in England differs materially in its treatment and notions from the Science of Right in Germany. How much of this difference is due to the double meaning of the word Right in the latter we need not now discuss. It may be admitted that in the Philosophy of Law we have not reached the final truth, and that in its systematic treatment there remains much to be done. But in neither respect are we likely to gain assistance from the works Mr. Hastie has translated. We by no means imply that nothing is to be gained by the study of German Jurisprudence, and we acknowledge the interest and value in other respects of the translations given us in Mr. Hastie's book. It is a welcome contribution from the vast storehouse of German legal literature. Our objection is that the work is beyond those for whom it is intended, and further that it hardly carries out its promise of giving us the best of modern German thought. Not only has a further development been given, as we have seen above, to the Philosophy of Law, but the conception of it as a living organism has been more fruitfully applied elsewhere than in any of the works before us. In these it does not justify its pretensions to add new vigour and life to the law, and so far as it points merely to systematic arrangement, we could hardly have anything more complete than the various editions of *Pandektenrecht*, for which the Germans are deservedly famous, and to which perhaps, more than anything else, we ought to look for actual help in arranging and simplifying our own law. None the less we are indebted to Mr. Hastie for good work done in a field of great extent, but which has hitherto proved so little attractive that even the works of Savigny have only been partially translated.

Informations (Criminal and Quo Warranto), Mandamus and Prohibition.

By JOHN SHORTT. London: W. Clowes & Sons, Limited. 1887.
La. 8vo. xxxii and 697 pp.

It would be impossible in the brief space of an ordinary review to examine in detail the wide field of matters covered by this work. For more than forty years no fresh book on English Crown Practice has appeared; and as during that period the law relating to it has undergone great modifications and development, the mass of materials relating to it has increased proportionately. Indeed, the extent of the subject may be partly gauged by the fact that the index of cases comprises nearly 2000 reported decisions.

The old information in Chancery which, now under the Supreme Court

Rules, has gained 'the name of action,' is not included in the scope of the work. And the same applies to informations on the Revenue side of the Queen's Bench Division. The former subject can hardly be considered foreign to the matter in hand, for such informations, whether they relate to Crown property (as in *Attorney-General v. Tomline*, 12 Ch. D. 214, 14 Ch. D. 58) or to the interests of the subject (as in *Attorney-General v. Compton*, 1 Y. & C. C. C. 417; *Attorney-General v. Vestry of Bermondsey*, 23 Ch. D. 60), are equally concerned with the protection of public rights in the name of an officer of the Crown. They are, however, technically quite distinct from the common law proceedings with which this book deals; and revenue proceedings are undoubtedly quite a special branch of Crown practice; hence the author may have felt it wiser to take advantage of that fact, and restrict his work to its present scope.

The arrangement of Mr. Shortt's book is most orderly and convenient. It is divided into four parts, dealing respectively with Criminal Informations, Quo Warranto Informations, Mandamus and Prohibition. Under each of these divisions is presented (i) a general statement of the nature, origin, and scope of the particular remedy discussed; (ii) an exhaustive review of the specific cases in which it has been applied; and (iii) an exposition of all the procedure necessary to put it in force, and carry it through all its stages.

In the execution of the work the author has been most industrious, thorough and exact. He appears to have examined the authorities fully and carefully, and has set forth their effect in terse and clear language, for the most part avoiding mere statement of opinion, and confining himself to an exposition of settled law; while with regard to questions in regard to which there has been or is a conflict of judicial opinion, his statement of the controversy leaves nothing to be desired. Such, for instance, is his statement as to the right of counsel to reply on behalf of the Attorney-General in *ex officio* informations (p. 83), as to whether quo warranto would lie for the office of Guardian of the Poor (p. 125), when permissive words are to be construed as imperative (pp. 254-6), as to the right of the Court of Queen's Bench to prohibit the Court of Chancery (pp. 427-9), and whether the power to prohibit is discretionary in the Court (pp. 441-6).

The text is followed by an appendix of forms selected partly from the appendix to the Crown Office Rules, 1886, partly from various practice books and reported cases. Then follow the Crown Office Rules themselves, Rules and Tables as to costs and court fees, and the standing orders, directions, forms, etc., relating to appeals to the House of Lords. To have appended all the rules referred to in the work would have added enormously and unnecessarily to the bulk of the book, which contains in those parts which relate to procedure the fullest information as to the orders, rules and forms which relate to the various stages in each proceeding.

We have noticed very few errors in perusing the book; at p. 158 an Irish case in L. R. Ir. 4 C. L. is cited as from 4 Ir. L. R. Q. B. D.; at p. 85 17 Q. B. D. is put for 17 Q. B., and at p. 606 for Rule 27 appears R. 7. It would moreover be an advantage in a subsequent edition to make the index rather more complete and exhaustive. Small points incidentally discussed, and yet of value, are apt to get buried in so large a book when not specifically indexed under appropriate heads.

If such an excellent book is somewhat dreary reading, it is no fault of the author. We are, indeed, much bound to anyone who has undertaken and executed so well such a really difficult and heavy task. And not one whit the less that it brings into the broad glare of day the dire need for

amending this cumbrous labyrinth of procedure, and reducing it to something like harmony with the modern and improved character of other parts of our procedure.

Steer's Parish Law. Fifth Edition. By WALTER HENRY MACNAMARA. London: Stevens & Sons. 1887. 8vo. xxvii and 604 pp.

THE subjects treated in this book are multifarious. The law as to some of them is to be found stated more in detail in other well-known text-books, while information as to others is seldom required. The aim of Mr. Steer, when he first compiled his book in 1830, was to give in a compendious form the various branches of the law which relate to the internal affairs and management of the parish, the old administrative unit of English local government. Since the first edition appeared many changes have been made affecting the parish, and for some purposes it now seems threatened with extinction altogether. As regards local self-government in civil matters, the Union and the Local Board of Health have almost everywhere superseded the parish, and even in matters ecclesiastical the old parochial boundaries have, in many cases, been so altered, that the parish of former days can no longer be recognised. But still the parish, for many purposes, survives, though perhaps with altered limits, and practical questions of law affecting it crop up from time to time. Matters affecting local government and administration are also constantly requiring attention, and a book of reference, by which the law applicable to them can be ascertained, is often useful. The fact that from time to time fresh editions of Mr. Steer's book have appeared—the present at an interval of only six years from the previous one—shows that the information there to be found is wanted, and that the form in which it is given is appreciated by the public. Mr. Macnamara has adhered to the former arrangement of the book, and carefully incorporated recent statutes and decisions, so as to bring the work down to date, October, 1887. Several statutes of this year, such as the Public Libraries Act, c. 22, the Allotments and Cottage Gardens Compensation for Crops Act, c. 26, the Open Spaces Act, c. 32, and the Allotments Act, c. 48, deal with matters which are treated in the book, and references are made to them in the text, though necessarily without great minuteness. He omits, however, to notice in chapter ix, which deals with burial grounds, the important power, conferred by the Open Spaces Act on sanitary authorities, of devoting disused burial grounds for purposes of public recreation and enjoyment. The provisions of the statute in question are somewhat involved, and a notice in the book might have directed attention to them, and so impressed the members of sanitary authorities with a sense of their duties which, in this respect, they are very likely to ignore. We must not, however, object too strongly to an omission such as this, for it is an exception, and most of the statutes and recent cases are noted in their proper context. The Allotments Act, and the Allotments and Cottage Gardens Compensation for Crops Act will, no doubt, be more or less used, and any work on parish law must, of course, contain a statement of their provisions. Mr. Macnamara sets them out in full in an appendix to his book; which is, perhaps, the best way of treating them at present. An explanation of their somewhat complex provisions might seem desirable; but till experience shows how they work, such an explanation could be of no authority, and might prove misleading. The editor is, therefore, probably right not to have attempted one. The present edition seems calculated to maintain the reputation of Mr. Steer's book as an index to many points of local

law, by the help of which those who have to work them out may be put on the track of the authorities they need, and from which those who are satisfied with a less exhaustive treatment may derive much useful information.

A Treatise on the Law of Settlements of Property made upon marriage and other occasions. By JOHN SAVILL VAIZEY. Two vols. London: H. Sweet & Sons. 1887. 8vo. cvi and 1714 pp.

THIS is a complete work on Settlements, and deals with the whole law on the subject. The present time is favourable for its appearance, because radical changes in this part of the law are in the air, which will probably have the effect of preventing the production of any work of this magnitude for many years to come. Such changes will of course produce the usual flood of ingenious little books on the new law: but a compendium of the whole law as it existed just before the change, must, if thoroughly and honestly elaborated, remain for some time almost a necessary of life to the practitioner, to be supplemented by some small book on the new Act or Acts. Mr. Davidson's vol. iii. is too old to rival Mr. Vaizey's book in this respect. Moreover the latter covers a wider field. The question is, whether the present treatise is capable of occupying such a position? And we think there can be only one answer. We have had the book in use for the last three months, and have found it trustworthy and complete. An enormous mass of nearly 6,000 cases has been digested into an orderly shape. It has been a great pleasure to us to find the very oldest, as well as the very latest cases concisely and correctly stated, and in their proper places. Where a point is doubtful, Mr. Vaizey has taken the further trouble to collect the opinions thereon of other eminent conveyancing authorities. Nor has he refrained from occasionally giving us the benefit of his own opinion. We may congratulate him on the fact that a decision given on the 29th of October last (*Re Cameron and Wells*, 36 W. R. 5) fully bears out the conclusion to which he had arrived (vol. i. p. 79) on the very doubtful point of law to which it relates. We feel quite sure that his acumen will be similarly justified in many other instances.

In dealing with the Statute law, Mr. Vaizey has adopted the plan of printing the actual language of the statutes in the body of his work, distinguishing them by an inner margin. Of course this plan has added to the bulk of the book, but it will be a very great convenience to the practitioner. Indeed, where the statute is recent, as in the case of the Settled Land Acts, no other plan would have been nearly so good. With regard to these Acts, we may say that that part of Mr. Vaizey's work which deals with them would constitute by itself alone a thoroughly practical and useful treatise on the subject.

The index is the work of the author's former pupil, Miss Orme. It certainly bears the marks of an inadequate appreciation of the wants of lawyers with regard to an index. But its defects are atoned for by a very complete table of contents: and our practical experience is that in a work of this kind the table of contents is of more importance than the index.

These two volumes are to be followed shortly by a volume of precedents. We think that the promised volume may be kept quite independent of the present treatise. In the midst of the changes through which we are now passing, the precedents of the day cannot be expected to possess the durable value which we venture to anticipate for the work now before us.

Practical Forms of Agreements. By H. MOORE. Second Edition, revised and edited by T. LAMBERT MEARS. London: Wm. Clowes & Sons, Limited. 1887. 8vo. xvi and 477 pp.

THE existence of this book is amply justified by the fact that within a little more than three years a second edition is demanded by the agreement-making public. The outcome of Mr. Moore's labours has now been revised by Mr. Mears. The advantage of a second eye travelling independently over the same ground is an obvious one, and the result is a convenient and accurate handbook covering, as the title-page informs us, such subjects as sales and purchases, enfranchisements and exchanges, mortgages and loans, letting and renting, hiring and service, building and arbitrations, debtors and creditors, not to speak of the forty miscellaneous forms adapted to purposes so varied as on the one hand the equalising of old and new shares in a company, and on the other the bestowal of a *douceur* for giving information in support of title. To have so multifarious a collection of precedents in the compass of a single volume is something gained. Mr. Moore's book is far more accessible to the ordinary purse, and manageable by the ordinary hand, than are the tomes to which the shelves of Lincoln's Inn are accustomed. Its aim is, we learn, to be suggestive. Mr. Moore's object is to provide 'a collection of precedents which would serve as practical suggestions to—rather than as forms to be copied out by—those engaged in reducing to writing a contract, the heads of which have been more or less definitely agreed upon between the parties themselves.' It would seem that Mr. Moore has aimed well and has hit the mark. Certainly the reader of Mr. Moore's form of lease, which takes up eighteen pages of this book, is far more likely to be bewildered by the plethora of suggestion than to find himself at a loss for ideas upon the subject. For, to some minds, it is far harder to reject a suggestion which is authoritatively put before you than to devise and cope single-handed with difficulties of your own invention. However, Mr. Moore's book has been tried and found to be a good book, and it seems to have lost nothing in the hands of Mr. Mears. Perhaps it might have gained more, for example, a table of cases, sometimes the readiest apparatus for directing the practitioner to the point for which he is searching. And we think that the hand of Mr. Mears would not have been sacrilegious had it ventured to correct the grammar of the opening paragraph of the preface which Mr. Moore wrote in 1884.

Chitty's Index to all the Reported Cases decided in the several Courts of Equity in England; the Privy Council, and the House of Lords, with a selection of Irish Cases, etc. Fourth Edition. By HENRY EDWARD HIRST. Volume V. containing the title 'Practice and Pleading.' London: Stevens & Sons; H. Sweet & Sons; W. Maxwell & Son. 1887. La. 8vo. xlii and 4211–5372 pp.

YET again we have to say that Mr. Hirst has done his work excellently well. It was in lines published only last April that we wished Mr. Hirst success in his struggle with the hydra-headed 'Practice,' and now in January, when these lines are read, he has already vanquished the foe in volume v., and has, we believe, promised volume vi. speedily. There is no doubt much of the work lying ready to Mr. Hirst's hand. Yet when we remember how many rules of Court must have been made, and how many practice cases must have been decided in the thirty years which have run between the end of 1853, when the third edition of 'Chitty' was published, and 1883, the year to which Mr. Hirst is now making his work complete,

we cannot but realise how laborious is the task with which the compiler has coped in the volume before us. Even the closely printed table of contents to the title 'Practice and Pleading' occupies thirty-four double-columned pages. The arrangement of this table would be better if thoroughly alphabetical, and in the body of the work the figures used might have been more clearly differentiated. But although in times past we have criticised Mr. Hirst's work, now as its task is drawing to a close—and progressing far more rapidly, be it observed, than in the days when he was a *collaborateur*—we must confess to a feeling that criticism is comparatively useless, that it is the eleventh or even the thirteenth hour, and too late to alter the plan or impair the consistency of the work. If faults there are—and no book is faultless—we have noted them before, and we need not do so again. The third edition of 'Chitty' is practically obsolete. The fourth is gradually winning its way into the practitioner's library. Its value there is known and appreciated. But its value will be doubled for purposes of reference when the last volume containing the index of cases comes into our hands.

Histoire du droit et des institutions de la France. Par E. GLASSON, Tome 1^{er}. Paris: F. Pichon. 1887.

M. GLASSON has set himself the task of comparing French, English, and Norman law and institutions, and tracing them from their common foundations to those divergencies into which they developed. He began with the history of English law and institutions. His six portly volumes¹ on this subject are well known to English readers. M. Glasson's new work is not likely to be inferior in quality to his previous one, seeing that he is now writing upon a subject with which he must necessarily be more in touch than with the unwritten common law of England.

The author adheres to his division into periods, subdivided into identical chapters, according to the subject-matter. He thinks this more reasonable than the suggestion made by some English critics that he should deal with individual institutions in a more consecutive manner.

The present volume is devoted to the Roman and the Gallo-Roman epochs, with an introduction on prehistoric times, and the making of the French people. On this subject M. Glasson is, if anything, still more decided than his predecessors in claiming almost exclusive Celtic origin for his race. He observes (p. 76): 'De tout ce qui précède il est permis de conclure que la nation française est née de Celtes et de Gaulois romanisés; au sud de la Loire l'élément celtique domine sans mélange sérieux de sang romain, bien que toute la population ait adopté la civilisation romaine; aux extrémités de l'Ouest, la race celtique ou gauloise est encore moins mélangée; enfin au nord de la Loire, au centre et à l'Est, la race gauloise domine manifestement, tout en subissant l'influence des mœurs et institutions germaniques . . . Le caractère et le génie gaulois sont demeurés à peu près intacts parmi nous. Les Romains d'abord et les Germains ensuite n'ont jamais formé qu'une minorité dans la nation . . . Il suffit de rapprocher le tableau que nous fait César des Gaulois de son temps avec le caractère et le génie actuel du peuple français pour se convaincre de la parfaite identité des anciens habitants de la Gaule avec ceux qui vivent aujourd'hui sur son sol . . . Ceux qui nous qualifient de race latine commettent une grossière erreur . . . La race est celtique ou gauloise; les institutions, romaines ou germaniques; la langue, latine.'

¹ *Histoire du droit et des institutions de l'Angleterre.* Pedone-Lauriel, 1882-3.

We may mention that the main divisions are preceded by exhaustive bibliographical tables, in which the labours of other workers in the same field are judiciously classified.

Traité de droit commercial maritime. Par ARTHUR DESJARDINS. Tome sixième. Paris: Pedone-Lauriel. 1887.

IN the new volume of his exhaustive and masterly treatise M. Desjardins deals with marine insurance. Here, as in previous volumes, the author has examined the historical theories and researches of others, adding the results of his own labours; but the bulk of the volume is devoted to a critical exposition of existing law as applied in France, and as contrasted in its most delicate particulars with the laws of other civilised states. Every page of the book bears evidence of the author's close reading and wide experience as advocate-general of the Court of Cassation. His book is not only one of the most valuable existing works on the law of maritime insurance, but, like his previous volumes, it is one of the first serious contributions to the relatively new subject of comparative law.

Le Tribunal International. Par LE COMTE L. KAMAROWSKY, traduit par SERGE DE WESTMAN, précédé d'une Introduction par JULES LACOUR. Paris: Pedone-Lauriel. 1887. 8vo. xxxiv and 528 pp.

THE Professor of International Law at the University of Moscow, who has offered to the public this exhaustive work on a subject on which more clap-trap has been written than on perhaps any other of international law, might have amplified his title with advantage. His book is not a philosophical disquisition on the possible advantages of an International Tribunal, as its laconic title might leave one to suppose. Half of it is devoted to international remedies and arbitration in actual practice; the rest is divided between an examination of the theories of jurists and a plan of organisation and procedure which he has evolved from his inquiry into existing practice and theory.

Professor Kamarowsky's scheme is one of voluntary recourse. States are not invited to surrender the right of war. He thinks that as a matter of honour they would resort to a voluntary tribunal, and, after having accepted its jurisdiction, respect its decisions. In case one of the parties disregarded the judgment delivered, the author thinks a sort of boycotting of the refractory state might serve as a sanction (p. 517).

Whether or not the scheme is realisable and, if realisable, is worth much effort, we do not venture to say. It seems to correspond better than most similar schemes to the actual historical development of settled judgment and justice as between members of the same State; and that is something, perhaps much, in its favour. In any case, the book is interesting and brings together a number of facts which are valuable *per se*.

Traité de Droit International Public. Par P. PRADIER-FODÉRÉ. Tome 3^{me}. Paris: Pedone-Lauriel. 1887. 1267 pp.

THIS volume deals with the relations of States with each other, comprising diplomatic relations and private international law (relations de droit privé). On the latter subject the author's treatment extends over upwards of 700 pages. The book has merits of a high order as regards exhaustive research, but it lacks that plentiful subdivision on which the value of works of reference so much depends. We trust that it will be provided with an ample index, which will make up in a great degree for the absence of more extended subdivision.

The French Code of Commerce. By SILVAIN MAYER. London: Butterworths. 1887. 8vo. xii and 307 pp.

THE French Code of Commerce has attracted the attention of still another member of the English legal profession. Seeing that three recent translations are now in the market, there must be a demand for this article. Yet we should have thought it was not so much a translation as an edition comparing, where necessary or desirable, French with English law that was wanted.

As regards Mr. Mayer's translation, we have checked it in numerous places and found it good. We do not, however, sometimes understand why the translator has retained the French term where an English one exists, as in the cases of *cession* (art. 541), *provision* (art. 115), *société en nom collectif*, *description* (p. 213), for which 'assignment,' 'cover,' 'partnership,' 'specification,' are quite intelligible, and are besides the technical equivalents. On the other hand, the translation of 'aval' by 'surety' (art. 141) is calculated to mislead. The word 'aval' belongs to the universal phraseology of the law merchant. On the whole, nevertheless, as we have said, the translation is good.

It is a wonder that the Civil Code, a much more interesting subject of study than the Code of Commerce, and in which alone the principles of French law are to be found, has not yet attracted the attention of contemporary English lawyers. Several old translations exist, but they are not good. Probably the task of properly rendering the Civil Code implies a great deal more trouble than the product is likely to show, and only a book containing valuable notes would repay its author in reputation for his labour.

Le Droit International Théorique et Pratique. Par CHARLES CALVO. 4^{me} Edition. Tome 1^{er}. Paris: Pedone-Lauriel. 1887.

ONE may say that a book on International Law which reaches a fourth edition is on its way to the blissful condition called classical. The last edition was in four volumes, the new one will be in five. This expansion is due to additions on the Right of War, maritime law, the adjustment of international difficulties generally, and private international law—a branch of his subject upon which Mr. Calvo promises especially full treatment.

The first volume of the new edition comprises the historical sketch (now in 137 pages), and the sovereignty, independence, self-preservation, equality, and dominion of States, and the law of the sea. In the division on the latter subject questions of coast fisheries and territorial waters are dealt with. We may mention by the way that the author, while referring to the judgments in the Franconia case, does not notice in this connection the Territorial Waters Jurisdiction Act, rather implying that the old uncertainty still exists.

The book bids fair to be one of the most complete general treatises on International Law yet published.

Traité du Droit International. Par F. DE MARTENS. Traduit du russe par ALFRED LÉO. Tome III. Paris: Chevalier-Marescq & C^{ie}. 1887.

WE have already noticed the first and second volumes of this useful work. (See p. 234 *supra*.) Vol. III deals with international criminal law, in which of course extradition is the chief matter considered, the adjustment of international difficulties, the right of war (including maritime warfare), and neutrality. As regards the three last-mentioned subjects the author has added much to the original and the German editions. That of political crimes is one on which M. de Martens' views are interesting at the present moment. As one might expect, he has no weakness for political offenders.

For the jurist, he observes, murder is a crime as to which political considerations are irrelevant. Crimes committed by dynamiters and anarchists, he thinks, are a universal danger, in the removal of which States ought to aid each other (p. 98). The index to the three volumes, which closes the third volume, is exhaustive.

The Powers, Duties, and Liabilities of Executive Officers, as between these officers and the public. Second Edition. By A. W. CHASTER. London: W. Clowes & Sons, Limited. 1887. 8vo. xxiv and 376 pp.

THE present winter is not a particularly felicitous season for the publication of a new edition of Mr. Chaster's book on Executive Officers. It bears on the title-page the motto, *Quis custodiet ipsos custodes?* and the introduction, reprinted from the first edition, contains some sentiments about the 'liberties purchased with the blood and treasure of our ancestors,' which are excellent in themselves, but irrelevant to the questions now engaging public attention. A discourse on the duties of other people to Executive Officers would have been more likely to be useful just now. The principal new development of the present edition is, that whereas its predecessor was a 'digest,' it 'has now been re-written as an exposition.' It is done with a good deal of care, and with copious reference to authorities. Anybody really injured by a policeman, a sheriff, an excise-man, or a statutory inspector of anything, will probably be able to find in it the remedy appropriate to his misfortune. The book is well arranged and clearly expressed. It may, from time to time, serve a useful purpose.

A complete Practice of the County Courts, including that of Admiralty and Bankruptcy, &c. Vol. I. Third Edition. By G. PITT-LEWIS, Q.C., M.P., assisted by H. A. DE COLYAR. London: Stevens & Sons. 1887. 8vo. cxxii, 856, 207 and 179 pp.

NOTWITHSTANDING impending legislation on the subject (but nowadays promised legislation impends long) Mr. Pitt-Lewis has published the first volume of a third edition of his work on County Court Practice.

The procedure in our County Courts is very complicated and depends on something like a score of Acts and amending Acts, and a Consolidation Act is much needed; a Bill for this purpose was indeed brought into and passed by the House of Lords last summer.

In the meantime we think that the practitioner cannot do better than consult this latest edition of Mr. Pitt-Lewis's work, which is we believe to the County Courts very much what Seton and Daniell are in the Chancery Division; and we have little doubt that this edition will have the success which the earlier editions have had.

The Annual Practice, 1887-8, &c. By THOMAS SNOW, HUBERT WINSTANLEY, and FRANCIS A. STRINGER. London: W. Maxwell & Son; H. Sweet & Sons. 8vo. lxviii and 1302 pp.

Wilson's Supreme Court of Judicature Acts, Rules, and Forms, &c. Sixth Edition. By CHARLES BURNET, M. MUIR MACKENZIE, and C. ARNOLD WHITE. London: Stevens & Sons. 1887. La. 8vo. cvii and 956 pp.

It is hard to decide between the merits of these two practice books. 'Wilson's Judicature Acts' is henceforth to be an annual too, so we may

expect that competition will assist in keeping up a high standard of excellence. 'Wilson' is a handsomer book, and has some advantage in print and paper. 'The Annual Practice,' though it contains more matter, is more compact and cheaper (the marked prices are 25s. and 20s.). 'Wilson' has got in the Appellate Jurisdiction Act of last session by the use of an extra page. 'The Annual Practice' has the fuller index, and cites a great many more cases; a rough calculation gives us in round numbers 4,800 cases in the 'Annual,' as against 1,400 in 'Wilson,' or more than three to one. On the other hand, the table in 'Wilson' gives references to all the current reports, while the 'Annual' seems to cite as a rule only the Law Reports and the Weekly Reporter; and the greater tale of cases is to some extent made up by free use of the Weekly Notes, which may be thought a doubtful gain. Both books will certainly do much good service to many practitioners. Perhaps it may be said that the 'Annual Practice' aims at the widest possible utility, 'Wilson' at being accepted as a work of something approaching to authority, and that in each case the editors and publishers have deserved success.

We have also received:—

Guide for Candidates for the professions of Barrister and Solicitor. By JOSEPH A. SHEARWOOD. Second edition. London: Stevens & Sons. 1887. 8vo. vii and 150 pp.—A practical little book for students to whom the living experience of professional friends is not accessible. It is a question whether some of the advice as to reading and noting books does not go too far towards giving the student a note-book ready made instead of helping him to make one for himself; and it looks as if Mr. Shearwood had never heard of Mr. Moyle's edition of Justinian. He is not satisfied with Sandars' Justinian, which he calls 'rather an unarranged and rambling work,' but he suggests no alternative. Our readers at the universities will be amused to learn that 'the minds of university dons are, with some exceptions, narrow and fossilized in the extreme:' but, as Mr. Shearwood writes on the next page of 'fellows of a university,' his knowledge of university and college affairs is presumably somewhat rusty. Then it is a pity that, while Mr. Shearwood justly impresses on students the need of learning to express themselves in good English both on paper and by word of mouth, he several times lets himself fall into very careless diction. However, the matter he has to convey is for the most part useful and sensible enough. The book, taken all round, supplies a real need, and supplies it reasonably well. We quite agree with Mr. Shearwood that practice in oral discussion ought to be in some way distinctly recognised and established as part of the scheme of legal education.

A Treatise on the Law of Bankruptcy: containing a full exposition of the Principles and Practice of the Law. Sixth edition. By GEORGE YOUNG ROBSON. London: Reeves & Turner. 1887. La. 8vo. lviii and 1209 pp.—Mr. Robson has published a sixth edition of his well-known work on Bankruptcy. He has added in this volume an interesting chapter on the law of private arrangements with creditors, a subject still of the highest importance, though it was the intention of the Legislature to do away with such arrangements altogether. The author fully recognises that under the Bankruptcy Act, 1883, the position of a trustee under a private deed of arrangement is one of difficulty and risk throughout the statutory three months during which it may be treated as an act of bankruptcy (p. 790). He seems, however, perhaps somewhat over-confident as to the effect of the

lapse of this period in making all safe. And in the absence of any authority (and none is given) we do not feel sure that a private deed of arrangement originating now in illegality would ever be carried into effect by the Chancery Division as stated by the author (p. 796). On the whole this volume seems likely to hold its own among the very numerous treatises on the subject, and to maintain the reputation gained by the earlier editions.

The Statutes of Practical Utility . . . passed 50 Vict. Sess. 2 (1886) and 50 & 51 Vict. (1887). By J. M. LELY. [Annual continuation of Chitty's Statutes.] Vol. 2, part 2. London: H. Sweet & Sons, Stevens & Sons. 1887. La. 8vo. viii and 107-327 pp.—The 'practical utility' of some of our recent legislation seems to concern the profession much more than the public. Mr. Lely points out some slips and ambiguities which could not have been better devised if it had been expressly intended to make work for lawyers: see especially the notes on the Copyhold Act. The provisions for procedure in the Margarine Act are almost as remarkable. The hitting of such blots is by no means the least important part of an editor's office. The notes on the Acts consolidating the law of coroners and sheriffs will doubtless be found serviceable by practitioners familiar with the older statutes, as they enable the sections of those statutes which are re-enacted in words or in substance to be identified at a glance.

The Doctrine of Cy Pres as applied to Charities. By ROBERT HUNTER McGRATH, JUN. Philadelphia, Pa.: T. & J. W. Johnson & Co. 8vo. 74 pp.—This is a prize essay of a student. It shows much diligence, but an imperfect digestion, on the part of its author, at all events so far as regards the English law. The law of *cypres* as administered in England rests on the flexible application of a few principles; the application has certainly been rather uncertain, but Mr. McGrath might, we think, have classified his cases better if he had more clearly understood the principles and particularly the statutes. His work is a little confused; but it must be admitted to be a difficult task for an American to give a clear and accurate account of the English law on Charities.

The Public General Acts passed in the fiftieth and fifty-first years of the reign of Her Majesty Queen Victoria. London: Printed for Her Majesty's Stationery Office, by Eyre and Spottiswoode. 1887. La. 8vo. xii and 448 pp.—This edition 'is brought out in pursuance of recommendations of successive Parliamentary Committees, urging that Acts should be published by the Government and placed in the hands of the public in a convenient form at the lowest possible price, and naming, as the most suitable size for general purposes, the royal octavo now adopted.' The price is three shillings, and the paper and print are good enough for all working purposes.

The Law relating to Solicitors of the Supreme Court of Judicature. Second Edition. By A. CORDERY. London: Stevens & Sons. 1888. 8vo. xxxvi and 464 pp.—The Preface to this book states that 'In the Preface to the First Edition, published in 1877, the present work was stated to be "an attempt to digest in a compendious form the statute law and cases bearing on the subject of solicitors of the Supreme Court of Judicature." The present Edition, while aiming at the same object and preserving the original arrangement of the book, has been to a great extent re-written, and incorporates the cases and statute law up to the present date, including the Order made under the Solicitors' Remuneration Act, 1881, and the decisions thereon.'

Du Monopole des Agents de Change, by ETIENNE BARBEROT (Paris: Arthur Rousseau. 1887. 166 pp.), contains, among other interesting matter, a short

history of the institution of stock-brokers in France, and a résumé of the same institution in the different States of Europe. The bulk of the volume sets forth the law affecting their privileges and the sanctions provided for preservation thereof.

Die Reform der Verwaltungsrechtsprechung und der Kompetenzconflicte in Italien, by Dr. KARL HEIMBURGER (Wien: Alfred Holder. 1886. 80 pp.); is the work of an able young jurist, well known to the members of the Institute of International Law. It deals with a question of considerable interest on the Continent, where administrative matters are subject to a special jurisdiction and procedure. Conflicts arise as to the competency of these and the ordinary tribunals. The author deals with the question as it presents itself in Italy.

Dictionnaire de la Propriété industrielle, artistique et littéraire. Par MM. POUILLET, MARTIN ST. LÉON, et H. PATAILLE. 2 vols. 1887. Paris: Arthur Rousseau.—This is an excellent practical work summing up the contents of the *Annales de la propriété industrielle*. It should be on the book-shelf of every person who requires a handy and exhaustive work on patents, trademarks, copyright, and other kindred subjects.

La istituzione dei feziali in rapporto al diritto pubblico romano. Per MICHELE ASMUNDO CARNAZZA. Catania: Tipographia di Giacomo Pastore. 1886. 8vo. 52 pp.—This is an interesting, well got-up essay on the *jus feziale* of the Romans, in which the author gives the results of extensive reading.

The Theory of Law and Civil Society. By AUGUSTUS PULSZKY. London: T. Fisher Unwin. 1888. 8vo. 443 pp.—The author states in the Preface to this work (which was originally published in Hungarian) that he has been induced to reproduce it in English by 'the belief that some of the doctrines set forth . . . may possibly be of interest to those engaged in an historical or analytical study of the notions and theories of law.'

A Practical Guide to Account Stamp Duty, Customs and Inland Revenue Act, 1881. By J. A. GOSSET. London: Stevens & Sons. 1887. 8vo. vii and 116 pp.—The object of this little book is, we learn from the Introduction, 'to produce a practical but concise introduction to a general knowledge of the tax.'

A Treatise on the Investigation of Titles to Real Estate in Ontario; with a Precedent for an Abstract. By EDWARD DOUGLAS ARMOUR. Toronto: Carswell & Co. 1887. 8vo. xix and 318 pp.

The Law of Bailments and Carriers. Second Edition. By J. SCHOULER. Boston, Mass.: Little, Brown, & Co. 1887. La. 8vo. lviii and 795 pp.—A critical notice of this book will appear in our next number.

The Cape Law Journal. Vol. I. Second Edition. Grahamstown, Cape of Good Hope: for the Incorporated Law Society, Josiah Slater. La. 8vo. xxvii and 352 pp.

Pettitts' Shilling Folio Scribbling Diary for 1888 (interleaved blotting-paper). *Pettitts' Oblong Diary and Note-Book* for 1888 (in two parts). *Blackwood's Solicitor's Call-Book* for 1888 (interleaved blotting-paper). London: Griffith, Farran & Co.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

PRIZE COURTS.

THE, apparently unintended, effect of recent legislation has been to throw considerable doubt upon the mode in which Prize Courts sitting in this country are hereafter to be constituted.

I. As to the Court of First Instance.

(1) The High Court of Admiralty has hitherto exercised the functions of such a Court; if not by its inherent powers, then certainly by virtue of a warrant addressed to the Judge by the Lords of the Admiralty, in pursuance of an Order in Council, such as the Order of 29th March, 1854.

(2) 'The Naval Prize Act, 1864,' created a statutory Prize Court in perpetuity, by enacting:—

§ 3. 'The High Court of Admiralty [interpreted to mean 'the High Court of Admiralty of England'] and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty jurisdiction in Her Majesty's dominions, for the time being authorised to take cognisance of and judicially proceed in matters of Prize, shall be a Prize Court within the meaning of this Act.' § 4. 'The High Court of Admiralty shall have jurisdiction throughout Her Majesty's dominions as a Prize Court.' § 55 saves the prerogative of the Crown.

(3) 'The Judicature Act, 1873,' by § 16, transfers the jurisdiction which was 'vested in, or capable of being exercised by,' the High Court of Admiralty, to the High Court of Justice. By § 33 'all causes and matters which may be commenced in the High Court of Justice shall be distributed among the several divisions and judges' as may be determined by any Rules of Court or Orders of transfer; and, subject thereto, by § 34, 'all causes which would have been within the exclusive cognisance of the High Court of Admiralty' shall be assigned to the P. A. and Admiralty Division.

It is submitted that the jurisdiction in Prize is at the present moment vested in the P. D. and Admiralty Division, subject to be divested by a Rule of Court assigning prize cases to some other Division, or to some judge or judges of the High Court of Justice. What personages are at present designated by such phrases as 'the Judge' or 'the Registrar,' of the High Court of Admiralty it is perhaps impossible to say.

II. As to the Court of Appeal.

(1) This used to be composed of Commissioners under the great seal.

(2) The 3 & 4 W. IV. c. 41 (1833), which created the Judicial Committee, sends to that committee all appeals in Prize which used to go to the Lords Commissioners or to the High Court of Admiralty. So also the 'Naval Prize Act, 1864,' §§ 5, 6, as to appeals from any final decree of a Prize Court.

(3) 'The Judicature Act, 1873,' § 18, transfers all the jurisdiction of the Judicial Committee 'upon appeal from any judgment or order of the High

Court of Admiralty' to the new Court of Appeal, whence, by the Act of 1876, there is a further appeal to the House of Lords.

It should be observed that Prize appeals from Vice-Admiralty Courts still go to the Judicial Committee.

Various questions are suggested by this state of things, such as: Whether the P. A. and Admiralty Division conveniently represents the High Court of Admiralty; whether the Judge of the Prize Court of first instance would be conveniently designated by a mere Rule of Court; whether the Judicial Committee would not be the most appropriate Court of Appeal, especially as Vice-Admiralty Prize appeals will continue to be heard by it; whether the Judicial Committee would not better than the Court of Appeal satisfy our treaty engagements; whether a single be not preferable to a double appeal in Prize cases.

The case seems to be one for legislation, e. g. to the following effect:—

(1) The High Court of Admiralty to be revived, but as a branch of the High Court of Justice, with a single judge, interchangeable perhaps with the other judges.

(2) The High Court of Admiralty to be the Prize Court.

(3) Appeals thence in matters of Prize to be, as from the Vice-Admiralty Courts, to the Judicial Committee.

T. E. HOLLAND.

The death of the respondent pending the appeal in *Sachs v. Sachs*, which is reported as before Mr. Justice Butt in 56 L. T., N. S., p. 920, has prevented an interesting question on the effect of a foreign divorce from being settled. It would perhaps have been better, under these circumstances, that the case should not have been reported; but, as this has been done, it is necessary to put on record the fact that the decision of the judge of first instance was not acquiesced in, and it may be desirable to add some comments on it. The head-note in the Law Times report is as follows, an important particular, which the learned judge found as a fact, being added in brackets.

'S., an Austrian subject by birth and parentage, and a Roman Catholic by religion, contracted a valid marriage in Berlin with a lady of the same domicile as himself, but described in the marriage certificate as of the Evangelical religion. This marriage, which by the law of Austria was absolutely indissoluble, was subsequently dissolved in Berlin by mutual consent, on a petition presented by the wife [the husband retaining at the time his Austrian national character and domicile]. S. subsequently married in England an English Protestant lady, his first wife being still alive. The second wife petitioned this Court for a decree of nullity, on the ground that the Berlin divorce did not effectually dissolve the first marriage of S., which she alleged was still subsisting and binding. Held that the Berlin divorce was good, and consequently held that the second marriage was good also.'

The neat point was thus raised whether a divorce granted by a foreign court to which the parties were not subject either by national character or by domicile, and which was clearly invalid in the country of their national character and domicile, has an international validity elsewhere, enabling the parties to remarry in England. The judgment, however, did not directly meet this point. Its pith is contained in the two sentences following, which we number for convenience. (1) 'It seems to me clear, both in principle and on authority, that the personal status resulting from the marriage in Berlin is a matter to be determined by the law of the country in which the contract was made. (2) It is impossible for me to pronounce the decree of the Berlin court invalid.' By (1) Mr. Justice Butt appears to ground the international

validity of the Berlin divorce on the fact that the marriage dissolved by it was celebrated at Berlin. This doctrine, it is submitted, is novel. Perhaps the nearest approach to it is to be found in the famous resolution in *Lolley's case*, which, when a marriage had been celebrated in England, denied recognition to a foreign dissolution of it 'for ground on which it was not liable to be dissolved *a vinculo matrimonii* in England.' But, besides the general discredit into which that resolution has fallen, to limit the recognition of a divorce granted in a different country from that of the marriage is not the same thing as to give unlimited recognition to divorces granted in the country of the marriage. With regard to (2), the petitioner did not seek to have the Berlin decree pronounced invalid, but to prevent its operation in England: she well knew that its validity in Germany could not be affected by any English decision. The distinction between holding a Scotch divorce to be valid in Scotland and allowing it to operate in England was expressly drawn by Sir Cresswell Cresswell in *Tollemache v. Tollemache*, 1 Sw. & Tr. 557, 561, and by Lords Selborne, Blackburn, and Watson in *Harvey v. Farnie*, 8 Ap. Ca. 43, 53, 58, 62, in the former of which cases the operation in England was disallowed, and in the latter allowed.

The remarks, however, which fell from Mr. Justice Butt during the argument show that his attention had been given to the real point, namely the conditions for the recognition of foreign divorces in England. He, in effect, pointed out that, according to the majority of the Court of Appeal in *Niboyet v. Niboyet*, L. R., 4 P. D. 1, the jurisdiction of the English Court to grant a divorce is not strictly limited by domicile, and asked 'then how am I, by parity of reasoning, to say that the German Court ought not to have done it?' I was not in the case below, but I advised an appeal, and argued before Lords Justices Cotton and Lindley and Mr. Justice Hannen against allowing any weight in this country to a foreign divorce, not only not based either on national character or on domicile, but which would certainly be disregarded in the courts of the parties' nationality and domicile. *Manning v. Manning*, L. R., 2 P. & D. 223; *Wilson v. Wilson*, L. R., 2 P. & D. 435, and *Scott v. Attorney-General*, 11 P. D. 128, were among the authorities used. The respondent, as had also happened in the court below, did not appear. Their lordships very naturally desired to be informed what proof had been furnished to the court at Berlin on the subject of Mr. Sachs's domicile at the time of the proceedings there, and before the answer could be given them Mr. Sachs died. The truth was that the jurisdiction of the Prussian Court depended by its own law on the question of domicile, but that Mr. Sachs's Austrian origin was concealed from it: the parties, being agreed, had allowed the court, which saw that he had been married at Berlin, to assume that he was a Berliner, who, though then actually resident in England, had not acquired a domicile in the latter country, as indeed he had not.

J. WESTLAKE.

Another correspondent writes on the same case:—

A domiciled Austrian marries a lady, also domiciled in Austria, in Berlin. By Austrian law this marriage is indissoluble. It is, notwithstanding, dissolved by the decree of a Berlin Court. The husband comes to England and contracts a second marriage with an Englishwoman, who, on finding out the first marriage, petitions to have the Berlin divorce declared invalid and the second marriage annulled (*Ingham v. Sachs*, 56 L. T. R. 920). In dismissing the petition Mr. Justice Butt said: 'Has this Court ever interfered with the jurisdiction of another Court dissolving a marriage

between two persons who were not English. . . . I do not think I can or ought to treat this case as if I were an Austrian judge sitting in Vienna. . . . It seems to me clear, both on principle and authority, that the personal status resulting from the marriage in Berlin is to be determined by the law of the country in which the contract was made. It is impossible for me to pronounce the decree of the Berlin Court invalid.' It is difficult to reconcile this with the principle of *Sottomayor v. De Barros* (C. A. 3, P. D. 1). What if the Berlin Court, instead of decreeing a divorce, had declared a marriage invalid by the law of the Austrian domicile to be valid ?

The provision in the Indian Evidence Act of 1872 that a previous conviction may always be given in evidence against a person accused on a criminal charge (s. 54), as well as the provision that the confession of a prisoner may be used against those who are being jointly tried with him (s. 30), have always astonished English lawyers, and I do not suppose that it is now seriously doubted by any one that both sections had better have been omitted. Section 54 was before the High Court of Calcutta recently (see 14 Ind. Law Rep., Calc. 721), and the Judges struggled manfully to get out of the necessity of admitting the evidence, but without success.

The judgment however is a somewhat remarkable one, on account of the peculiar course taken by the Chief Justice (Sir W. Petheram) and his colleagues. It does not appear that the Court had the least doubt about the meaning of the section, which is as plain as it can be. Nor had any doubt been thrown upon it by the practice of the Courts during the seventeen years that the Evidence Act had been in force, or by any previous decision. Nevertheless the Court, taking what was said to be a course 'more than once taken in recent times,' examined the proceedings of the Legislative Council at the time the proposed Act was under discussion, and finding a report on this very section of a committee which was in accordance with the plain meaning of the words, they set out the report in their judgment, and then say, 'It is impossible that we should disregard the terms of this report when construing in the face of the difficulties which we have adverted to this section of the Act.' These difficulties it must be remembered are not difficulties of construction, for there are no such difficulties; but difficulties felt by the Judges in acquiescing in the policy of the law as laid down.

Now it would be curious to know what course would have been taken by the High Court if the report of the Committee had been against the section instead of in its favour. Unless their search into the proceedings of the Legislature was a merely useless proceeding, it must be supposed that they would have set aside a clear and express provision of the Legislature because a committee of members had reported against it. It would be very surprising to hear that such a course as this had been taken, even once, by any Court either recently, or at any time.

Also with great deference to the Judges, I do not think that they bring out quite clearly, although in one place they hint at, the true reason why such evidence is objectionable. It is in most cases clearly not irrelevant. It was not irrelevant in the case under consideration, where the prisoner was charged with receiving stolen goods and the previous conviction was for the same offence. There is not a sane man to be found whose judgment would not be affected by such evidence in a great many cases, and in all cases the value of the evidence is not with due care very difficult to estimate. And this no doubt is what is meant by the expression in the report of the committee which shocked the Calcutta Judges, that if such evidence prejudices 'the prisoner he 'ought to be prejudiced.'

The special objection to this kind of evidence is that juries are too prone to think that a rogue is safest in jail, and as soon as a previous conviction is proved they are apt to pay very little further attention to the evidence on the new charge. A previous conviction for arson would be fatal on a trial for the same offence before a jury of English farmers, and a previous conviction for dacoity would be equally fatal before a jury of Bengal rustics.

The general objection to the evidence is that it is contrary to the tenderness with which Englishmen have been accustomed to see the criminal law administered. This method of administering the criminal law is not common. It is doubtful whether it prevails anywhere except in England and countries which have taken it direct from England. It formerly prevailed in India; and the departure from it commenced about the year 1870. It is certainly open to question whether this change in the spirit of the law has been productive of good.

W. M.

Wilson v. Glossop, 19 Q. B. D. 379, is an illustration of the principle which is sometimes overlooked, that the claim of a wife, when living apart from her husband, to render him liable for necessities supplied to her is a right of the wife to support, and in no way depends upon the law of agency. *M*, the wife of *X*, commits adultery with *X*'s connivance. *X* afterwards turns her out of doors. *A* supplies *M* with goods. *X* is liable to pay for them. In other words, *M* has an absolute right to be supported by *X*.

It is not often that decisions under the Income Tax Acts turning, as they must do, mainly on the precise words of a confused body of enactments, can possess much general interest. *Colquhoun v. Brooks*, 19 Q. B. D. 400, is an exception to this remark. The decision determines a point of importance in itself, and at the same time affords an example of the different theories which two judges of great ability may maintain as the method to be pursued in the interpretation of a statute. The essential facts of the case are these:—*X*, who resides wholly in England, is partner in a firm which carries on business solely in Australia. Large profits are made by the firm. A part of *X*'s profits is remitted to him in England. On this part he admits his liability to pay income tax. The other and the larger part of his share in the profits is left by him for investment in Australia, and is never remitted to him in England. *X* denies his liability to pay income tax on this larger part of his share in the profits. 16 & 17 Vict. c. 34, s. 32, sched. D, imposes liability to the payment of income tax on 'profits or gains arising or accruing to any person residing in the United Kingdom from a trade carried on in the United Kingdom or elsewhere.' On these facts Mr. Justin Stephen holds that *X* is liable to pay income tax on the whole of his profits. Mr. Justice Wills, on the other hand, is of opinion that the profits made in Melbourne, and not remitted to this country, are 'foreign' property, and hence not liable to the operation of the Income Tax Acts. Sir James Stephen's opinion, being that of the senior judge, must for the time be taken as the judgment of the Queen's Bench Division.

Palliser v. Gurney, 19 Q. B. Div. 519, illustrates a point on which we have before frequently insisted in the pages of this REVIEW, namely, that the Married Women's Property Act, 1882, does not make a married woman capable of rendering herself personally liable on a contract. The liability (if any) incurred is the liability of her separate property. Hence it follows

that a married woman is not capable of rendering even her separate estate liable in respect of a contract, unless at the time when the contract is made she is possessed of some separate property; and further, that the burden of showing that she was so possessed lies on any creditor who brings an action against her for a breach of contract. The decision of the Court in *Palliser v. Gurney* might have been confidently anticipated by any one who had studied in *Re Shakespear*, 30 Ch. D. 169, and the principle involved in it is carried even a step further in *Scott v. Morley*, W.N. 1887, p. 200. But it is hardly possible to insist too much upon a peculiarity in the law of contract which laymen find it difficult to understand, namely, that a married woman cannot in strictness incur a personal debt. She acts as the agent for a fictitious person known to the law as her 'separate property.' Hence she is very far from occupying the position of a feme sole, and enjoys as regards her power to contract the rights without the liabilities of independence. This is a state of things which it may be suspected cannot last; whilst it does last it will constantly produce results surprising to the unlearned.

An infant is the spoilt child of the English law. *Johnstone v. Marks*, 19 Q. B. D. 509, following *Barnes v. Toye*, 13 Q. B. D. 410, has determined in favour of an infant the question which has given rise to some doubt whether articles, e.g. clothes, which are in their nature necessities, can be necessities for a youth who is already well supplied with goods of the same kind. The Queen's Bench Division (constituted for the occasion by members of the Court of Appeal) has now made it clear that a tradesman cannot claim payment for any goods, whatever their character, which the infant does not really need. The shopkeeper who claims to be paid for goods supplied to a man below twenty-one, must prove 'not that the goods belong to the class of necessities, as distinguished from that of luxuries, but that the goods supplied, when supplied, were necessities to the infant.' This decision is a logical enough deduction from the principles governing the liabilities of minors. Persons curious in legal problems may note that the question has been raised at *nisi prius*, whether money lent to an infant for the purpose of procuring, and spent upon the purchase of 'necessaries,' is itself a necessary. Judge and jury appear to have agreed that such a loan is a necessary, but though reliance may be placed upon well-established decisions in equity bearing out this view, we venture to doubt whether it is really reconcilable with the terms of the Infants' Relief Act, 1874. An infant at any rate who is sued for money lent for the price of necessities might probably enough find it advantageous to obtain the decision of the Court of Appeal on the question whether, since the Act of 1874, such a loan is recoverable.

The judges of the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) who sat as a Divisional Court in *Johnstone v. Marks* 'added that should the question be raised before them sitting as a division of the Court of Appeal, they would be prepared to give the same decision.' *Quære*, what, if anything, ought this dictum to add to the weight of the decision itself if cited before another division of the Court of Appeal?

'This Court,' said Lord Eldon in *Huguenin v. Bassey* (14 Ves. 273), 'is not to undo voluntary deeds.' However improvident gifts may be they will not be set aside, if freely made, even by an infant (*Taylor v. Johnston*, 19 Ch. D. 603): 'stet pro ratione voluntas,' expresses the attitude of English law. If a Court of Equity sets aside a gift, it is to secure and not

to infringe the right of free alienation. But wherever, from the relation of donor and donee, dominion may have been exercised by the donor, the Court jealously scrutinizes the gift, and if the donee cannot prove non-exercise of the dominion, sets it aside. Of all kinds of dominion spiritual ascendancy is the most powerful and the most subtle; it becomes irresistible when aided, as in Miss Allcard's case, by the air of a convent, by vows of poverty and obedience, and rules inculcating it as the highest duty of a sister to surrender her whole mind and will to that of her superior. The Court of Appeal could hardly have come to any other conclusion in *Allcard v. Skinner* (36 Ch. Div. 145) than it did. In declaring the gift to have been originally voidable, the Court however entirely acquitted the donees of having brought to bear any unfair or undue influence other than that which inevitably resulted from Miss Allcard's conventual environment. Miss Allcard's delay of six years in taking steps to avoid the gift was however fatal to her claim. She had elected when she was free to affirm the gift, so the majority of the Court held, and thereby debarred herself from afterwards claiming to have it set aside. This legal result will coincide with the conclusions of most people's moral sense.

The Bankruptcy Act, 1883, whatever its shortcomings, will not have been passed in vain if it has helped to educate what Lord Justice James termed the 'commercial conscience.' Take insolvent trading, on which Mr. Justice Cave made some very salutary remarks in *Re Stainton, Ex parte Board of Trade* (4 Morr. B. R. 242). There is a strong temptation when a trader finds himself insolvent to go on in the hope of a revival of prosperity or of selling his business to greater advantage as a going concern, just as the unlucky gambler plunges more deeply in the hopes of retrieving his losses. Such hopes are rarely fulfilled; but whether they are or not makes no difference in the morality of the matter. A person who goes on trading, knowing himself to be insolvent, is simply, as the learned judge pointed out, speculating with his creditors' money. If to keep up his credit by keeping up appearances he lives at an extravagant rate, he is simply living on his creditors' money. It is his duty, as soon as he finds himself unable to pay 20s. in the pound, to call his creditors together, and leave it to them to decide whether he shall go on or not. The revelations resulting from the Warwickshire Bank failure come as an apt commentary on the learned judge's text.

The 'commercial conscience' may also find instruction and improvement from the recent trade-mark case (*Newman v. Pinto*, 57 L. T. R. 31). There the plaintiff, a cigar importer, sold cigars in boxes branded with the words 'La Pureza' (an old brand of Havannahs), Habana, Ramon Romnedo (a fictitious Spaniard), and having on them a picture of the tropics (registered as the importer's trade-mark), with the arms of Havannah and Spain on shields. The whole was, as Lord Justice Bowen expressed it, 'an elaborate concatenation of pictorial lies;' but the plaintiff (who sued for infringement) excused his not coming 'with clean hands' on the ground that nobody believed the lies. This was accepted by Mr. Justice Kekewich, but the Court of Appeal declined to recognise such a conventional standard of morality or give the plaintiff any assistance. *Honeste vivere* is a precept no less of the law of England than the civil law.

In connection with the morals of trade, *Drummond v. Van Ingen* (12 App. Cas. 284) may be noticed. The principle there recognised—that where goods

are ordered of a manufacturer for a particular purpose, the sale being by sample does not exclude the manufacturer's implied warranty of fitness except as regards those matters which the purchaser might have ascertained from an examination of the sample—is no new law. In *Heilbutt v. Hickson* (L. R., 7 C. P. 438) a sample shoe, the sole of which was stuffed with brown paper, was held not to exclude the warranty: so in *Mody v. Gregson* (L. R., 4 Ex. 49) a sample of grey shirtings weighted with undetectable china clay. The common sense of the matter has never, however, been better put than by Lord Macnaghten in *Drummond v. Van Ingen*. 'When a manufacturer proposes to carry out the ideas of his customer, and furnishes a sample to shew what he can do, in effect he says: "This is the sort of thing you want, the rest is my business; you may depend upon it there is no defect in the manufacture which would prevent goods made according to that sample from answering the purpose for which they are required."' A coat which can only be safely worn in public by a very careful person without danger of falling to pieces, owing to 'slipperiness' of texture, can hardly be said to fulfil the purposes for which it is required.

In *Hawken v. Shearer* (56 L. J. Q. B. 284) *A* was lessee of a field with an unfenced quarry in it belonging to *B*. One of *A*'s cattle while grazing fell down the quarry and was killed. *Prima facie* there was no obligation on *B* to fence (the excavation not adjoining a public highway), but *B* had by working enlarged the quarry, and by doing so increased the danger to *A*'s right of pasturage. The maxim 'Sic utere tuo ut alienum non laedas' thus applied, and the Court held *B* liable on the authority of *Groucott v. Williams* (4 B. & S. 149, 32 L. J. Q. B. 237). In that case *B* had the right to work minerals underlying *A*'s farm, as *A* knew, and for that purpose sank a shaft, the mouth of which he covered with branches and stones, but so negligently that *A*'s mare fell down the shaft and was killed. On principle (for there was no direct authority) the Court held *B* liable. By sinking the shaft he had, as Mr. Justice Blackburn expressed it, made an alteration in the normal state of things, and was bound therefore to render it harmless.

The doctrine of part-performance of parol contracts within s. 4 of the Statute of Frauds was applied by Courts of Equity, acting by analogy to s. 17, to frustrate fraud. Like other well-intended but undefined doctrines of equity it has been left to be worked out by judicial decisions which have not always been consistent. In *Britain v. Rossiter* (11 Q. B. D. 123) the Court of Appeal refused to apply the doctrine to a parol contract for service not to be performed within a year. This was the decision, but all the judges treated the doctrine as confined to contracts relating to land, though Thesiger L.J. admitted that on principle he did not see why a similar doctrine should not be applied to the case of a contract for service. In *Alderson v. Maddison* (8 App. Cas. 467) the ground of the doctrine was elaborately examined by Lord Selborne, and he pointed out that the limitation of the equitable jurisdiction suggested in *Britain v. Rossiter* was hardly reconcilable with Lord Cottenham's opinion in *Hammersley v. De Biel* (12 Cl. & F. 64 n) and *Lassence v. Tierney* (1 Mac. & G. 572); nor is it reconcilable with *Taylor v. Beech* (1 Ves. Sen. 297-8), in which Lord Hardwick treated a part-performed parol agreement in consideration of marriage as enforceable, though not relating to land. The truth is, that the question has almost always arisen in relation to the possession, use, or

tenure of land, because a stranger being in possession of land is usually explicable on no other hypothesis than the existence of a contract, and is therefore less equivocal than most other acts of part-performance. In the recent case of *McManus v. Cooke* (35 Ch. D. 681) Mr. Justice Kay has expressed the view that the doctrine applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing, thus putting it on a rational basis. The doctrine is one to be applied with extreme caution. The policy of the Statute of Frauds was and is to prevent important classes of contracts resting on the 'frail testimony of memory,' and is not to be too readily relaxed because the Statute sometimes shelters fraud.

'Tenantable repair' is a subject which, like Lord Bacon's Essays, 'comes home to men's business and bosoms.' It is strange, therefore, especially in the dearth of authority, that the decision in *Crawford v. Newton* (C. A., 35 W. R. 54) should have remained nearly a year and a half unreported. The substance of the decision is that tenantable repair does not include decorative repair. Papering is purely decorative repair: painting is not. It is partly for decoration, but it is also for the protection of the wood-work. No doubt, as Mr. Justice Cave observes, if a man takes a house which is papered new for him for three years, he must return the house with the paper not stripped or torn off, or anything of that sort, but subject only to the fair wear and tear of the paper; but if he remains on so long that the paper in the natural course becomes useless for a future tenant, he is not bound to put on a new paper, though he may do it, of course, if he likes, to please himself. If the tenant has allowed the plaster on the walls to come off, the boards to decay or get broken, or the mantel-pieces to get damaged, all these are breaches of the covenant to keep in tenantable repair. In a word, a covenant to keep in tenantable repair seems to amount to no more than a covenant not to commit waste, voluntary or permissive, and is therefore mere surplusage as already implied by law.

Hersant v. Blaine (56 L. J. Q. B. 511) is noticeable as illustrating the progress of the fusion of law and equity. An agent denying the title of his principal and refusing to hand over to the principal moneys belonging to him was by a well-settled principle of equity liable to pay interest from the date of such refusal. This principle has now been held since the Judicature Act to apply to a common law action for money had and received.

In *In re Johnson* (36 W. R. 51) the Court showed no disposition to shorten its arm for punishing contempt. A solicitor (after a decision against him by a judge in Chambers) abusing and all but assaulting the solicitor on the other side in the precincts of the Royal Courts of Justice is certainly a scandal, and it is satisfactory to know that it is also, according to Lord Hardwicke's division of contempts, 'a scandalizing of the Court,' or as Lord Esher expressed it, a 'contemptuous interference with judicial proceedings, the judge acting in his judicial capacity.' A judge making an order in Chambers or in his private house is, as Lord Chief Justice Wilmot laid down in *Rez v. Almon* ('Notes of Unreported Opinions and Judgments,' 265), acting in a judicial capacity and entitled to protection for his person and character. The same principle extends to any interference with judicial proceedings which would bring them into contempt, for this is a contempt, not indeed of the judge's person or character, but of the Court. A master exercising judicial functions in no way differs from a judge for this purpose.

Where there is such an interference with the administration of justice there is contempt, and *semble* there is no defined limit of space or time.

It is 'pretty to observe,' as Mr. Pepys would say, how the old presumption of legitimacy of a child born in wedlock has been sapped by judicial decision. From the time of Edward I to Charles I the presumption was irrebuttable that a child born in wedlock was legitimate if the husband was within the four seas (*Donne & Egerton v. Hinton & Starkey*, 14 Jac. I), but rebutting evidence of the husband's incapacity might be given. Separation, even if the wife was living in adultery, was not sufficient: non-access had to be shown to be not merely improbable but impossible (*Broughton v. Broughton*, 1807). In *Goodright v. Saul* (4 T. R. 356) it was held for the first time that the child of a married woman begotten and born while the husband was in the country might be proved a bastard by other evidence than that of the husband's non-access. In *Davies v. Morris* (5 A. & F. H. L. 163) general evidence of conduct and *res gestae* was admitted to rebut the presumption. *Bosvile v. Attorney-General* (12 P. D. 177) recognises the law as well settled, but the rebutting evidence must still, in Lord Lyndhurst's words, be 'strong, distinct, satisfactory, and conclusive.' Presumptions which may cause the fact to be found against the truth are not favoured by English law. Thus the presumption of law as to the death of a person abroad and not heard of for seven years relates only to the fact of death. The time of death must be proved, not presumed. This is no doubt productive of inconvenience, as in the recent case of *Re Rhodes, Rhodes v. Rhodes* (36 Ch. D. 586), where the class of next of kin of the intestate whose death was presumed was different at the beginning to what it was at the end of the seven years, but a presumption of law as to the time of death would be productive of still more inconvenience and injustice.

De Quincey's elder brother, as he tells us in charming Autobiographic Sketches, possessed 'a genius for mischief amounting to an inspiration.' The potentialities of the Bills of Sale Act, 1882, are hardly less extraordinary. This time it is not the statutory form but debentures. 'Nothing in the act,' says s. 17, 'shall apply to any debentures used by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels, and effects of such company.' Read by the ordinary rules of construction the exemption is restricted to mortgage, loan, and other incorporated companies *ejusdem generis*, and so restricted, is insignificant. The Act therefore applies to all other trading companies, and this was the view of Mr. Justice Grove in *Jenkinson v. Brandley Mining Co.* (19 Q. B. D. 568). Debentures therefore not in the statutory form will, as to all goods and chattels comprised in them, be void. Under the Bills of Sale Act, 1878, non-registration of debentures was not a matter of much moment, only rendering them void as against an execution creditor while they remained good against the company (*Davies v. Goodman*, 5 C. P. D. 128) or the liquidator (*Marine Mansions Co.*, 4 Eq. 601): the order and disposition clause is not, by s. 10 of the Judicature Act, 1875, imported into the winding-up of companies. But under the Bills of Sale Act, 1882, debentures or a 'covering deed' or trust deed securing debentures and not registered or not in the statutory, will, as to chattels comprised therein, be absolutely void. The course adopted by companies is to insert an independent charge on the effects of the company in the debentures similar to that upheld in *Ross v. Army and Navy Hotel Co.* (C. A., 34 Ch. D. 43), but in this case the proper construction of s. 17 was not argued.

In *Cochrane v. Rymill* (C. A., 27 W. R. 777) Lord Justice Bramwell expressed a hope that there was a tendency to make the rule of conversion less technical. After deciding that the defendant auctioneer in that case had been guilty of a clear conversion, he adds, 'What if a man were to come into an auctioneer's yard holding a horse by the bridle and saying, "I want to sell this horse, will you find me a purchaser?" Then if the auctioneer says to the bystanders, "Here is a man who wants to sell a horse, will any one buy him?" and some one bought the horse, then there would be no act of conversion on the part of the auctioneer. He would be merely a conduit pipe.' Very much the case foreshadowed by Lord Bramwell occurred in *Turner v. Hockey* (56 L. J. Q. B. 301). A dairyman who had mortgaged a cow by bill of sale, but remained the ostensible owner, took her to the defendant auctioneer's place of business, put her in the defendant's pen, and gave the defendant instructions to sell her for him. This the defendant did in the course of about half an hour, and paid the proceeds to the client. The Court (Day and Wills JJ.) held that this was no conversion, the defendant having acted merely as an intermediary, and without any other interest than that of a commission. This is mitigating the rigour of the law as enunciated by Lord Ellenborough in *Stephens v. Elwall* (4 M. & S. 259), but (whether it be within the power of a Divisional Court or not, to which we offer no opinion) it seems a necessary concession to the changed conditions in the course of business.

Hardly any term is more laxly used than acquiescence. The so-called acquiescence in the case of a voidable gift like that in *Allcard v. Skinner*, or of a voidable contract, means that the person having the option to set aside the gift or rescind the contract has elected to affirm and not to disaffirm. Such election is a matter of inference. Mere lapse of time will not of itself warrant the inference, but it is always an important element, and coupled with knowledge or the means of knowledge almost conclusive, and for a very sufficient reason. A voidable gift, like a voidable contract, is valid until rescinded, and each day's delay justifies the donee in assuming that the donor does not intend to disaffirm. Undue delay in disaffirming is *laches*. The case of a person with a right of action, e.g. for trespass or breach of a restrictive covenant, is entirely different. The covenantor has in such a case no reason to conclude, from the covenantee's mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, an intention on his part to acquiesce in the breach. Nothing short of accord and satisfaction or release under seal will in such a case divest the cause of action; not even an express promise by the person injured not to take legal proceedings (*De Bussche v. Alt*, 8 Ch. D. 286). In the recent case of *Duke of Northumberland v. Bowman* (56 L. T. R. 773) Mr. Justice Kekewich held fourteen months delay by the covenantee no bar. The covenantee may however so act, as he did in *Sayers v. Collyer* (28 Ch. D. 103), as to preclude himself from afterwards complaining. This is equitable estoppel.

The December Law Reports come too late for more than the briefest comment. The reversal of the decision in *Blackburn Low & Co. v. Vigors* (12 App. Cas. 531) will hardly cause surprise. A shipowner insuring is bound by the knowledge of his captains and ship agents: he is also bound by knowledge of the broker who effects the insurance, and non-disclosure of such imputed information, if material, will vitiate the contract, but to hold

the shipowner bound by the uncommunicated knowledge of a broker whom he has employed unsuccessfully to effect an insurance, so as to vitiate a subsequent contract for insurance effected through *another broker*, is to extend the doctrine of constructive notice beyond its legitimate limits.

Batthyany v. Walford (36 Ch. Div. 269) is an instructive commentary on the much misunderstood maxim 'Actio personalis moritur cum persona.'

The *Fraternity of Free Fishermen* (36 Ch. Div. 329) illustrates the rule laid down in *Chapel House Colliery Co.* (24 Ch. Div. 259) that the Court will not make a winding-up order where no good will result from it. The only property of the Fraternity was a free fishery, but the fishery existed for the benefit of the members of the Fraternity and for them only, and was accordingly not a saleable asset. The creditors' only remedy in such a case is a receiver.

Re Clarke, Coombe v. Carter (36 Ch. Div. 348) is a useful contribution to the law of assignments of future property. The time will come, as Lord Justice Bowen observes, when the subject will have to be thoroughly considered by the Court of Appeal and some more definite rule than that in *Holroyd v. Marshall* (10 H. L. C. 191) laid down for the guidance of the profession.

Tuck v. Priestler (19 Q. B. Div. 629) reverses the Divisional Court's judgment. As the Court of Appeal construe the Fine Arts Copyright Act, copyright in a picture is conferred by s. 1 prior to registration, though no right of action arises till registration. The corollary is that copies made without consent before, but sold after, are piracies, and their sale may be restrained. This construction is in harmony with that of the Acts relating to literary copyright and engravings, but the language of s. 4 might well give rise to a difference of opinion in the Court.

Williams v. Colonial Bank (36 Ch. D. 659) is one of a class of cases becoming increasingly common, cases of competing rights arising from a fraudulent or unauthorised deposit of share certificates. Cf. *Colonial Bank v. Hepworth* (36 Ch. D. 36), *Easton v. London Joint Stock Bank* (34 Ch. D. 95). The House of Lords will, it may be hoped, deal with the whole question in the pending appeal in the latter case.

There has been a growing disposition on the part of the Courts to adopt as the test of covenants in restraint of trade, whether they are reasonably necessary for the protection of the covenantee. Reasonableness being once admitted as the foundation of the doctrine a covenant in restraint of trade unlimited both in space and time may be good, because under the changed conditions of trade it may be reasonable. It was so in fact held by Mr. Justice Kekewich in *Davies v. Davies*. Cotton L. J. is however of opinion (36 Ch. Div. 359, 386) that the common law doctrine is too much engrained in our history to be changed by alterations in the character of the commercial intercourse of the world, or, if it is to be changed, it ought to be done by the House of Lords. Bowen L. J. inclines to the same opinion, while Fry L. J. is not inclined to depart from his own former decision in *Rousillon v. Rousillon*.

The point which the Court actually decided, and unanimously, is that a covenant to retire from a particular kind of business 'so far as the law allows' is too vague to be enforced. *Palmer v. Mallet* (36 Ch. Div. 411) is another case on this fruitful subject.

In *Baddeley v. Earl Granville*, 19 Q. B. D. 423, Wills and Grantham JJ., the same judges who decided the case of *Thomas v. Quartermaine* in the first instance, 17 Q. B. D. 414, have held that case as affirmed by the Court of Appeal, 18 Q. B. Div. 685, not to apply to an injury to a workman caused by the breach of an express statutory duty on the part of the master. In so holding they only followed the opinion expressed by the Lords Justices in *Thomas v. Quartermaine*. We have already said (vol. iii. p. 365) that the judgments of the majority of the Court of Appeal seem right as law and legislation stand. It is obvious however that the result is to make the law more complex than ever. *Thomas v. Quartermaine* makes an apparent exception to the rules of the Employers' Liability Act (for it is hardly possible to make an ordinary disinterested layman, to say nothing of a workman, see that it is not a real exception); and *Baddeley v. Earl Granville* makes a sub-exception out of that exception. The Act is already a bundle of exceptions from a common law doctrine which is itself an exception from the general rule of a master's liability for the acts and defaults of his servants. So that on the whole we have a nest of exceptions, like a Japanese puzzle-box, four deep one within another. And that is the way we amend our laws for the benefit of the unlearned in the last quarter of the nineteenth century. See also *Yarmouth v. France*, 19 Q. B. D. 647. After all it seems to come to this, what is the true inference of fact in each case? Has the workman, knowing the danger, elected to incur it? 'Sciens' is not 'volens.'

There is certainly a tendency at the present day to neglect, perhaps to forget, the ancient principles upon which our law has been built up. The case of *Hall v. Ewin*, 36 W. R. 84, which turned on the application of the case of *Tulk v. Moxhay*, 2 Ph. 774, is an illustration of this tendency. *Tulk v. Moxhay* was a typical equity case, and depended on very simple and elementary principles of equity. If an owner of land covenanted that he would use it in a particular way (positive), and would not use it in another particular way (negative), then, whether he assigned over or whether he did not, he was liable to be sued at law on his covenants if he failed to perform and observe them. If he himself broke the negative covenants, his legal liability being established, equity gave the ancillary remedy by injunction where damages would have been an inadequate remedy: on the ground that it was unconscionable on the part of the covenantor to buy off observance by payment of damages. If he assigned, and afterwards his assign did something in breach of the covenant, the original covenantor was still liable in damages; but an injunction against the covenantor was idle, seeing that his committal for contempt of court would have no practical effect towards persuading his assign to observe the covenant. The assign was not liable at law (unless in those cases where the covenant ran with the land), and consequently there was no legal liability to which the equitable remedy by injunction could be ancillary. If the Court of Chancery had reasoned no further, the result would have been that an act done behind the back of the covenantee, viz. the assignment by the covenantor to the assignee, would have deprived the covenantee

of his remedy by injunction in those very cases where damages would have been an inadequate remedy: and the observance of the covenant might have been bought off by payment of damages.

What then was Equity to do? It looked, as usual, to the conscience of the party, and declared that it was *inequitable* (not *unlawful*) by such a combination between covenantor and assignee to deprive the covenantee of the observance for which he had bargained; and enjoined the assignee to that extent. But where the proceeding was not unconscientious, as where the assignee had no knowledge of the covenant, there Equity refused to interfere on behalf of the wronged covenantee, however inadequate his remedy in damages might be. Equity never held the assign bound except in this indirect way. Equity never dreamt of the assign being under a direct liability in equity on the covenant, when he was under no direct liability at law. Such an idea would have been entirely foreign to the strictly ancillary nature of Equity.

It is true that all this reasoning is not set out in the report of *Tulk v. Moshay*; but in those days it would have been entirely superfluous to set out considerations with which the whole Equity bar and bench were thoroughly saturated; such considerations being part of the very basis and foundation of the whole system of Equity. That they were, however, assumed on all hands is evident from the fact, that the injunction in that case was only asked for in respect of so much of the covenant as was restrictive of the use of the land. There was no magic in the fact of the covenant being a restrictive covenant, except that it was only as to the restrictive covenant that the assign was doing anything unconscientious.

An adherence to these principles will afford a safe clue through all the intricacies of this subject. Thus, if the covenant were to pay rent, or to repair buildings (as in *Haywood v. Brunswick, &c. Society*, 8 Q. B. Div. 403), there would be nothing unconscientious in the assignee refusing to perform it himself, provided he did nothing to prevent the original covenantor from performing his covenant.

In *Hall v. Ewin*, the case which has suggested the foregoing observations, the facts were as follows:—

In 1849 the predecessor in title of the plaintiff granted a lease of certain premises for a term of eighty years. The lease contained a restrictive covenant, by which the lessee covenanted that he, his heirs, executors, administrators, and assigns 'shall not at any time during the term use, exercise, or carry on in or upon the said demised premises, or permit or suffer any part thereof to be occupied by any person or persons who shall use, occupy, or carry on therein any noisome or offensive trade business or employment whatsoever' without consent. In 1851 the original lessee sub-demised the premises by way of mortgage for the residue of the term of eighty years less three days. In 1865 the executors of the mortgagee, in exercise of the power of sale in the mortgage, sold the sub-lease to J. Ewin, one of the defendants, who purchased with notice of the restrictive covenant. In October, 1885, Ewin demised the premises to the defendant McNeff for a term of twenty-one years, and the demise to McNeff contained a covenant by McNeff with Ewin in terms similar to the restrictive covenant in the original lease. McNeff entered into possession of the premises, and in February, 1886, he opened an exhibition of wild animals on the premises. An action was brought by the plaintiff as successor in title of the original lessor, and by one of the tenants of premises adjoining, claiming an injunction against Ewin and McNeff. Of course McNeff was liable, but the question in the Appeal Court related solely to Ewin.

How, on the old principles of equity, any one could possibly suppose that an assignee, who had parted with the possession of the land, and was consequently doing nothing unconscientious, nothing to prevent the full observance of the covenant, and was not liable at law, could be liable in equity for a breach of any covenant, whether positive or negative, as was contended in *Hall v. Ewin*, is simply incomprehensible.

‘The Blackstone Publishing Company of Philadelphia are continuing to issue their excellent series of’ [pirated editions of English] ‘text-books with promptitude, and in the same excellent style in which they commenced.’ So says the *Canada Law Journal* of Oct. 15. English authors are accustomed to the process of being reprinted by enterprising citizens of the United States without consent on their part, or acknowledgment on the other. But it is rather hard to find this kind of enterprise warmly commended by our own fellow-subjects.

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THE LAW QUARTERLY REVIEW.

No. XIV. April, 1888.

SIR HENRY MAINE.

I.

AMONG the many tributes that have been paid to the rare and high qualities of the late Sir Henry Maine, and among the acknowledgments of the irreparable loss caused by his death, it is right to record the great and manifold obligations, the public debt, of India towards a man whose writings and administrative work have done so much for that country. There is, as Sir H. Maine has himself said, a certain dulness and dimness attaching to all things Indian; but this very obscurity seems to enhance the effect of turning upon them the light of genius; for in certain hands the confused and opaque materials of Indian history and government become clear, interesting, and even picturesque. And India on her side has a kind of uncommon attraction for the very few men of brilliant intellect who have from time to time seen or studied the country, or who have taken part in its politics. To none of these is India's debt greater than to Sir Henry Maine. As a member, first of the Governor-General's Council, and afterwards, until his death, of the Council of the Secretary of State for India, he took a leading part in the solution of various arduous and complex legislative problems, and in some considerable measures of executive administration. Upon such questions he brought to bear his wide knowledge of and insight into archaic ideas and institutions, into the laws of their growth, decay, or development; while, conversely, his practical experience aided him to verify the result of his philosophic researches, and to expand their range. His method, his writings, and his speeches at the Indian Council Board have had a strong and lasting effect upon all subsequent ways of examining and dealing with these subjects, whether in science or practical politics. He possessed an extraordinary power of appreciating unfamiliar

facts and apparently irrational beliefs, of extracting their essence and the principle of their vitality, of separating what still has life and use from what is harmful or obsolete, and of stating the result of the whole operation in some clear and convincing sentence.

In a very sympathetic notice of Sir Henry Maine which appeared in the *Saturday Review* it is mentioned that he could read a thick volume, in such a way as to appropriate what concerned him in it, while an ordinary man read a hundred pages. In just such a swift and penetrating spirit he seems to have read India, the sacred literature, the ponderous histories, the innumerable volumes of official records, and the heavy bundles of papers that came before him as a member of the Government. He could throw a succession of rapid glances over its diversified social and political formation; and his remarkably accurate apprehension of its salient features commanded the admiration of all who knew the difficulty of such intellectual exploits. The local expert who, after years of labour in the field of observation, found himself with certain indefinite impressions of the meaning or outcome of his collected facts, often found the whole issue of the inquiry exactly and conclusively stated in one of Maine's lucid generalisations. Or else a suggestion thrown out, or a line of research indicated, would set the explorer on the right course, and show the real scope of the induction. And while he thus cast into orderly form a jumble of facts, or pointed with his divining rod to the sources of discovery, he never made the mistake of employing the incoherent, changeable, and inconsistent notions of primitive people to build up clear-cut positive theories. To such theories, which are epidemic in India, he invariably applied the tests of actual evidence and comparative experience; he gave to fictions their proper place and value; and by detaching what was fit to survive from what had lost its reason of existence he did much toward reconstructing the whole history of early Indian institutions on the basis most favourable for preserving their modified continuity.

The problem that has been for the last thirty years before the English Government of India is the adjustment of the mechanism of a modern State to the habits and feelings of a vast mixed multitude in various stages of what we have decided to call Progress. In such a period of unusually rapid transition Maine's instinct of discernment and skill in adaptation were most valuable. A great quantity of writing about India, and much of what has been done in India, is necessarily founded upon guess-work and half-knowledge, which accounts for much hazardous speculation in the departments of thought and action. Moreover, the Oriental contempt of qualified statements and of limitations, whether in

time or space, is apt to be contagious among all who have to do with Eastern law or literature; local characteristics are treated as universal; castes and creeds as immutable; the scanty data massed in this fashion are piled up into wide and lofty inductions. Sir Henry Maine's large and accurate intelligence enabled him to detect and point out these snares and delusions, which have more or less encompassed all previous English writers and politicians in their treatment of peculiarly Indian questions. To pass over earlier examples, I may suggest that if any one desires to measure, in literature, the difference between the generalisations of a man of literary talent and a man of genius, he should set Buckle's well-known demonstrations regarding Indian society and religions side by side with Maine's conclusions on the same matters; conclusions so cautiously stated, yet so full of life and fecundity. The former writer went wrong in premises and process, in his facts and his inferences; the latter makes each fact ring true before he passes it, analyses and classifies, draws his analogies with the prudence of Bishop Butler, and finally sets out the real import of the phenomenon under scrutiny in a manner that gives a firm foothold for further advance. A certain number of passages might be cited from his works that have perhaps done more to arrange and extend our ideas upon the past and present constitution of Indian societies than anything elsewhere written on the subject. He was probably the first writer who thoroughly perceived and explained the immense value of India as a living illustration of the ways and ideas of early civilisations. In his first work, upon *Ancient Law*, he referred to India as 'the great repository of verifiable phenomena of ancient usage and ancient juridical thought;' and he drew largely upon the Hindu Codes in support of his views. His residence of more than six years in India materially added to his exact information upon such curious and much misunderstood phenomena as are seen in communities by caste and by kinship; and in his later works the references to his ampler stores of Indian knowledge are numerous and important.

I think I am not wrong in supposing that Maine's Indian observations have added materially to the general science of jurisprudence. It is certain that as a statesman, no less than as a writer, he has left a lasting impression upon Anglo-Indian legislation, and upon the policy of our internal government of India. His books are read, as a matter of course, by all who study the more complex problems of Indian administration, for there is scarcely one of those problems which he has not at least touched, and by touching aided its solution. His large and tolerant temperament especially fitted him to deal with the prepossessions, inherited or acquired, not only

of the native Indian, but also of the active unscientific English spirit of rough and ready administration, and with the conservative notions of the formal English lawyer. He made allowance for all those social and professional prejudices which meet and conflict over Indian questions. In examining the distinction of races by manners, he notes 'the appreciable amount of sympathy that is quenched by the misuse of an asperate;' and instead of denouncing the outlandish jargon of Anglo-Indian terms, as they often appear in official papers, he gently objects to 'the employment of phraseology too highly specialised.' He found himself in a country where for centuries political institutions had scarcely existed, and in which, for that very reason, the people had created for themselves a system of religious ordinances and social usage stronger than has been known elsewhere in the world. No better example could be found of the force with which the needs and risks of a primitive age can bind men together by spontaneous combination, for the purposes of social preservation and continuity. The despotic sovereign is there, but he neither makes nor enforces the laws which the people obey, and which change gradually with the varying conditions of their existence. The priest declares himself to be the sole legislator, infallible because he gives no reasons; but even his absolute commands rest on the hidden basis of utility; and one custom is built up on the ruins of another by the help of such temporary scaffoldings as fictions supply. In such a country as this Maine's office, as a jurist and legislator, was to guide and regulate the process by which the separate groups are very gradually dissolving into a population with some of the rudimentary characteristics of a great territorial nationality, under the pressure of a government that has introduced and enforces certain general principles of modern polity. The problem was, and is, to do this without abruptly breaking in upon personal laws or discarding traditional sanctions; remembering that mutability, not immutability, is of the nature and essence of primitive ordinances. The English government of India has of itself so profoundly affected the conditions of life and the habits of all Indians, that nothing but our own positive law could have prevented the old customs and rules of society from following these changes of the environment, so that we are doubly bound to take care that our legislation shall help instead of hindering the natural transformation produced by our presence in the country. Maine rendered valuable service to India by placing all these things in their true light, and by insisting on them in practical law-making and administration. His Minutes, and his speeches in the Legislative Council of India, deserve to be collected and re-

published as appendices illustrating his more elaborate works. On the Native Marriage Bill, for example, his speech is full of sagacity and keen argument. The object was to relieve from disability to contract a lawful marriage natives who might be dissenters from the recognised ritual of their caste and faith. In the natural state of Hindu society such dissenters, who have always been numerous, were excommunicated; that is, they could no longer eat or intermarry with their former brotherhood; and they then proceeded to form a fresh communion of their own, with full power to regulate their own internal economy. But the English law courts, which harden the old caste rules and have no power of creating new ones, recognised the excommunication but not the fresh communion, so that a dissident might and did find himself left outside all ascertainable laws of marriage. The Advocate-General declared the offspring of such persons to be illegitimate; the British law endorsed and very seriously enhanced the penalties of the Brahmanic ritual. In describing the causes and consequences of such a situation, in pointing out that we ourselves were stereotyping the movable rules and formulas of Hindu orthodoxy, in stating the proper position and duties of an impartial legislature bound to protect the civil rights of all sorts and conditions of men, in recalling the true history of civil marriage in Europe before the Church took charge of the contract, Maine's power of exposition and argument gave him an easy victory. He showed how the British law courts, precisely by reason of their tolerant principles, might operate so as to shut up, most intolerably, the natives of India in the cast-iron circles of a certain number of traditionary rituals, whereby institutions that had hitherto been subject to indefinite changes of outline would become rigorously defined and motionless. Upon this remarkable effect of the introduction of English law and procedure into India, he laid all the stress that its importance merits. 'Judging by experience,' he said, 'there are no limits to the influence which a clear and simple body of law exercises in absorbing less advanced systems;' and he explained over and over again how the law courts, instead of liberating Indian society, might be unintentionally led to tighten its bonds. Among unlettered folk reasonable usage is apt to degenerate into unreasonable usage; the ritual survives when the reason is forgotten or overlaid. But while this corrects itself in a self-regulating society, in the hands of the English Judge the rule gets fixed, and becomes really formidable. 'The capital fact in the mechanism of modern States is the energy of legislatures;' but in proportion as the Leviathan of English law, backed by irresistible sanctions, breaks up and devours the weaker indigenous species, the English legislator has continually to

reconstruct, reconcile anomalies, and repair disintegration. How far the influence of our law can extend is best known, perhaps, to those who have lived in the native States, beyond British jurisdiction, and who have detected certain semi-divine oracular personages privily appropriating a ruling of the Calcutta High Court. At a time when ordeals, oracles, omens, ingenious judgments like those of Daniel or Solomon, and all similar contrivances for deciding hard cases are being thus superseded, other tests of truth are urgently required, and a new fountain of civil obligation (to use Maine's image) must be opened. Here Maine was on his own ground, and pre-eminently qualified for the position in which he found himself. No scientific jurist ever had a finer opportunity of applying his principles to actual legislation; he stood at the opening of a new era, for modern India really dates from the ending of the great mutiny, and he had at his back Sir John Lawrence, the best Indian administrator of this generation.

Maine's manner of dealing with land legislation is marked by the same capacity for seeing things as they are, and opposing facts to preconceived opinions. He took a considerable share in some discussions of the highest importance regarding occupancy tenures in Oudh and the Punjab. Proprietary right, like religious belief, assumes innumerable forms in India, and mainly for the same reason, that in such matters the sovereign hardly ever interfered, but left things to their natural course so long as it did not affect his security or revenue. Now the English sovereignty, which undertakes to find a rule and a sanction upon all matters disputable, is obliged to interfere; and here again there has been a notorious tendency to build stiff theories upon vague and untrustworthy inferences. Maine's incisive analysis easily laid bare the illusory nature of the evidence upon which it was sometimes proposed to revise the existing land-holdings of a province. 'The land of India,' he said on one occasion, 'is the foundation of society, and it is asserted that once every fifteen or twenty years a number of gentlemen, many of whom it is not disrespectful to call young gentlemen, may go in and reconstruct the very basis of society.' Equally sharp and apposite were the weapons he used in combating men who picked out of Bentham doctrines for extreme application to India. Arguing upon the question whether litigation should be made to pay, by stamp fees, the expense of maintaining law courts, he said: 'Some people seemed to suppose that governments ought to be like Oriental monarchs, who first appropriated the greatest part of the property of their subjects and then, by way of compensation, sat in the gate and administered justice for nothing'—a system which, aided by bribery, has in fact always been most popular in Asia.

In short, among all these anomalies and conflicting notions, between those who used the law too rigorously, and those who thought an Anglo-Indian Judge needed no law at all, except the dictates of equity and good conscience; between the Hindu who would abate no jot or tittle of the sacred codes, and the Hindu who drew his will with the object of trying 'how far some of the most recondite feudal doctrines of English law could be imported into India,' Maine was always ready to clear and show the way, upsetting absurdities, disarming prejudices, and surmounting obstructions by the wider range and superior precision of his controversial weapons. One of his best-known axioms, that the tendency of society is from status to contract, has had much vogue and influence in India; though no one would have been less disposed than Sir Henry Maine to hurry on this process in India. It may be remarked that the policy of the latest land legislation has been rather to arrest than to expedite this tendency, by giving legal validity to status, and that in the general reaction that has recently set in against simple contractual relations may be traced a connection with the revival of the feeling of race distinctions, which seems to be yet destined to play a considerable part in the politics even of European nationalities.

During his term of office as legal member of the Governor-General's Council 209 Acts were passed, the great majority of which were drawn under his personal supervision, and all of which he considered and criticised. There was hardly a single branch of administration to which these measures did not relate. He also established the legislative department of the Indian Government, which has thenceforward drafted or superintended all projects of law throughout India. On his retirement from India, after more than six years' residence, Lord Mayo delivered in Council a very high encomium upon his services; and the representatives of all classes of the community joined in voting him cordial thanks, in attesting their sense of his conspicuous ability, and their deep regret at his departure. In the education of the people of India he had always taken a warm interest; his opinions in discussing the subject carried great weight, and his addresses during his three years' tenure of the Vice-Chancellorship of the Calcutta University will long be remembered. And Lord Mayo declared that 'in the Executive Council of the Empire Mr. Maine was always found a wise councillor, an impartial adviser, and a minister of originality, sagacity, and resource.' His reputation stood equally high with successive Secretaries of State; nor can there be any doubt that his life was most valuable to India, and his death a grave misfortune.

A. C. LYALL.

II.

Sumner Maine était membre associé étranger de l'Institut de France, Académie des Sciences Morales et Politiques. Aussi au début de la séance de samedi 11 février, M. Bouillier, vice-président de cette Académie, en l'absence du président M. Fustel de Coulanges, s'est empressé de faire part à ses confrères de la mort de cet homme illustre. C'est, a-t-il dit, une perte irréparable pour l'Angleterre et pour la science. M. Fustel de Coulanges, retenu à Cannes par sa santé, a écrit à l'Académie pour la prévenir qu'il se propose, dès son retour, de lire une notice sur 'Cet homme sans égal dans la connaissance des sociétés primitives.' L'éloge sera d'autant plus intéressant qu'à plus d'une reprise, Sumner Maine a essayé de réfuter ce qu'il a appelé les *brillantes études* de M. Fustel de Coulanges sur la cité antique; il l'a d'ailleurs fait avec une courtoisie et une discrétion qui devraient servir d'exemple de bon goût à un grand nombre d'historiens. Sumner Maine a établi qu'on peut remonter beaucoup plus loin que ne l'a fait Fustel de Coulanges, et que certaines lois, considérées comme très anciennes, par exemple les lois de Manou, sont relativement récentes si on les compare à d'autres textes d'une haute antiquité. Les études de Sumner Maine sur les institutions primitives de l'humanité ont fait autant de bruit en France qu'en Angleterre. Les savants qui s'intéressent aux origines de l'humanité connaissent ses remarquables dissertations sur les livres sacrés de l'Inde, sur la famille primitive, sur les premières formes de la monarchie, sur la procédure dans les sociétés en voie de formation. Plus d'une théorie de Sumner Maine a sans doute rencontré parmi nous des contradicteurs, surtout celles qui touchent à l'histoire du droit français. On se demande si le savant seul a écrit les lignes qui prétendent justifier les revendications d'Edouard III à la couronne de France. Il est également surprenant que l'éminent auteur reproche aux juridictions royales et notamment aux parlements de n'avoir pas suffisamment écrasé les juridictions seigneuriales et les abus qui s'y rattachaient. Mais s'il est permis de discuter telles ou telles solutions de détail, on n'en doit pas moins reconnaître, en envisageant l'œuvre magistrale de Sumner Maine dans son ensemble, qu'elle émane d'un esprit de premier ordre, d'un savant d'une science sans limites et d'une pénétration tout à fait extraordinaire.

E. GLASSON.

III.

I should like to say a few words in commemoration of Sir Henry Maine. I was just about to bring him forward as a candidate for honorary membership in the Juridical Society of Berlin when I received the sad news of his premature death. Hence, I am in a position to state that, according to the general opinion of German lawyers, England has been deprived of a man who not only enjoyed European fame but was fully deserving of it.

Germany may perhaps boast of having for a long time been foremost in the historical investigation of the *Origines Juris Antiqui*. But in due modesty we have at the same time to acknowledge that our work was by necessity confined to the sources of Roman and ancient Teutonic law, or to the comparative study of medieval institutions.

Sir Henry Maine has opened and cleared a new field, undiscovered before him, for investigation into the affinities of the economical and jural condition of primitive society and its later survivals, as they are shown to have been in existence on a world-wide area lying between the eastern boundaries of the Ganges and the western shores of Ireland, between the Hindus and the Celts.

He has unveiled mysteries which before his publications had remained in the state of hieroglyphic language before Champollion. His interpretation was not drawn so much from literary remains and ancient documents as from the keen observation of facts and a strong imaginative perception of phenomena no more alive in modern society, but still capable of being presumed on sufficient grounds. He endowed this kind of presumption, in historical jurisprudence, with the power of claiming as much attention, and as justly, as circumstantial evidence does in a Court of Justice.

The great confederation of science and literature has to mourn the death of one of her best citizens.

FRANZ VON HOLTZENDORFF.

IV.

Le opere del Maine in Italia.

L'indirizzo storico nello studio del diritto e della società portò in questo secolo mirabili resultamenti in tutta l'Europa, e si rianodò in Italia alle tradizioni scientifiche che il Vico aveva così bene riassunto ed applicato. Le ricerche storiche sul diritto romano e su l'antico germanico furono in questi ultimi anni e sono ancora presso di noi la predilezione di illustri scienziati. Anche i nostri

filosofi hanno compreso che nella comparazione degli usi e delle norme di popoli antichi e di tempi passati stanno le basi per una seria *sociologia*. Ma a mostrare la via da tenersi per pervenire a considerazioni sociologiche col mezzo della storia ha immensamente contribuito il Maine, le opere del quale sono sempre più studiate ed ammirate da noi Italiani. E principalmente il suo celebre lavoro sopra l' *antico diritto* fu il primo a rendere comune ai nostri giuristi il desiderio di cogliere le leggi *sociologiche* nella storica *evoluzione* delle norme giuridiche. Questo connubio fra l'archeologia del diritto e la scienza sociale non è ancora compiuto, e non è ancora formata come disciplina a sé la *giurisprudenza comparata*, come la chiamava il Maine nel suo lavoro su le 'Village Communities' (1883): ma quando questa scienza sarà fatta grande e sicura ed avrà nelle università un suo proprio insegnamento, allora il Maine ne sarà considerato come uno dei più valenti fondatori.

La nostra celebre Accademia dei Lincei lo aveva nominato suo membro come segno della grande stima, nella quale il Maine era tenuto in Italia.

La morte di uno scienziato così illustre acuto e geniale ha addolorato tutti gli studiosi di Europa: ma la gloria del Maine e la nazione Inglese possono consolarsi nell' immortalità delle opere che egli lascia.

PIETRO COGLIOLO.

[On some future occasion I hope to say a few words, from my own point of view, of the work of my late friend and master. For the present it is enough to have brought together the concurrent and independent witness, first of one who has had almost unique means of seeing and judging Maine's Indian achievements, and then of representatives of the leading European schools of jurisprudence. I must be allowed, however, to assure my learned friend M. Glasson that very few Englishmen, if any, could at this day find enough patriotic interest in Edward III's interpretation of the Salic law to warm their discussion of it, or warp their conclusion, by any measurable fraction of a degree or a millimeter. I am sure, at any rate, that Sir Henry Maine did not.—EDITOR.]

THE STORY OF THE CHAIR OF PUBLIC LAW IN THE UNIVERSITY OF EDINBURGH¹.

EVERY civilised man is a born story-teller. The present is a mere point of time, and in itself is not even a luminous point. Before we have well apprehended it, it has become the past, and it is by the light which the past sheds on it alone that we apprehend it consciously, and that it projects its light on the future. It is to the conscious recognition of this light from the past, and of the way by which it has led us hitherto, that we apply the epithet of civilisation. By means of it alone rational activity becomes possible. The man who lives in the present is a barbarian, whatever be the other conditions of his existence. To him his own life is unintelligible: a mere time-flake on the ocean of eternity; it brings him no inheritance and leaves him nothing to transmit. His activity is a succession of leaps in the dark. The stage of civilisation, moreover, stands almost always in a very close relation to the measure of historical knowledge; and it is marvellous with what rapidity families and nations and races that have ceased to be historical slip back into barbarism. When the footprints of preceding generations are obliterated, each new generation has to begin the work of ages afresh, and it is not surprising that it should often prove unequal to the task. When this task has been long neglected its performance becomes impossible to those on whose ancestors it was incumbent, and it is for this reason that the East must now look to the West for its own forgotten story.

As regards the individual, the sphere within which the duty suggested by these considerations is imposed is determined by his character and the circumstances of his life. The function of the historian, in any wide or general sense, does not lie at the door of the majority even of civilised men. Their duty is, by availing themselves of such gifts and opportunities as may be bestowed on them, to contribute material for a history that shall be creditable to their generation. But within certain limits, every father of a family is bound to be its historian. I do not say that it is his duty to become a genealogist and to trace all the ramifications by which he and his kindred are intertwined with other families, or to determine the extent to which their fortunes were affected by distant events. If his race was illustrious, that will be done for him by others; if it was obscure, he may be pardoned if he allows its earlier history and less immediate fortunes to be forgotten. But with the recent history of the family, its

¹ Professor Lorimer's introductory lecture, Session 1887-8.

history for the last three or four generations, we shall say, the case is different. That is, or ought to be, known to him as it can be known to no one else; and if he fails to transmit it he squanders the birthright of his posterity.

Now it appears to me that the holder of a public office stands to the public, to his patrons, and above all to his successors, very much in the position of the father of a family in this respect. If it is an ancient office he may leave its early history to the general historian. But its recent history, that history by which its present utility must be judged and its adaptation to the exigencies of the immediate future must be determined, is, or ought to be, known to him as it can be known to no other man. He may be prejudiced, it is true; but he cannot well be ignorant, and when he is entering on his twenty-sixth session, as is my case to-day, and on his seventieth year, as will be my case three days hence, it is scarcely likely that his vision should be greatly distorted by self-interest. On these grounds it appears desirable that I should now tell you the somewhat curious story of this chair, and give you some indication of my own experience as its occupant.

A Faculty of Law was included in the original scheme of each of the three older Universities of Scotland, and both at St. Andrews and Glasgow Canon and Civil Law were occasionally taught. Bishop Elphinston, by whom King's College in Aberdeen was founded in 1494, had himself been a professor of Canon Law at Paris, and of Civil Law at Orleans; and in his Statutes he enacted that the Canonists at Aberdeen should teach after the manner of Paris, and the Legists after the manner of Orleans. To him, too, is ascribed the suggestion of the enlightened statute of King James IV, 5. c. 54 (1494), which enacted that barons and freeholders should send their sons and heirs to the grammar schools, till 'they be competentlie founded and have perfite Latine, and thereafter to remain three years at the schules of art and jure, swa that they shall have knowledge and understanding of the laws.' In 1501 Elphinston further obtained an indulgence from the Pope, with the object of encouraging the study of civil law amongst ecclesiastics of all classes, with the curious exception of the Mendicant Friars.

The Reformers' scheme for remodelling the University of St. Andrews assigned to St. Salvador's College the privilege of granting degrees in law after one year's course in Ethics, Economics and Politics, and a four years' course under two readers in Municipal and Roman Law.

In Edinburgh the first serious effort to introduce the scientific teaching of jurisprudence appears to have been made by Reid, Bishop of Orkney, who, amongst his many offices and preferments,

was President of the Court of Session. Reid left a bequest for the endowment of a School of Arts and Jure, the object of which appears to have been to carry out the provisions of the statute just referred to. But, as in the case of another 'Reid-bequest'¹ that we know of, the founder's will was treated with scant respect. After tracing this discreditable transaction through its various stages, Sir Alexander Grant concludes his narrative thus: 'And so it came to pass that the only memorial of Bishop Reid's munificent purpose to endow a college "of Arts and Jure" in Edinburgh existed for some time (though it has long since passed away) in the name given to "fourteen little chambers" which formed part of the original College buildings, and which were called "the old Reid chambers".'²

Another miscarriage took place when, in 1500, a professorship of laws was actually founded by the Lords of Session, the Town Council, the Advocates and the Writers to the Signet. Two professors were successively appointed to it, but for some mysterious reason they taught nothing but classical literature.

Subsequent to the foundation of the Court of Session it is probable that, in addition to the instruction by apprenticeship which must always have existed, instruction of a more scientific character, both in civil and municipal law, was given privately by members of the Bar. This however was less with a view to the completion of a legal education in Scotland than by way of preparation for the foreign study which long after the foundation of the University in 1582, and even after the Union in 1707—down indeed to the French Revolution—was considered indispensable for admission to the Bar. But slight and elementary as it no doubt was, I think we may assume with some confidence that the teaching of jurisprudence in Scotland even at this early period was not destitute of a scientific character. In addition to the care with which the connection between classical and legal studies was maintained, and the special provisions which we find for a philosophical and historical groundwork being laid in ethics, economics and politics, this assumption seems to be warranted by the preponderance of the ecclesiastical over the lay element on the Bench. It was by the canonists rather than the civilians that the study of the *jus naturale*, as a substantive branch of science, was carried on, and it was by them, as I shall show you hereafter, that its importance as the basis of the *jus inter gentes* was pointed out. Scotland was so entirely separated from the Roman Catholic world by the reformation as scarcely to have felt the influence of the Spanish School of Jurisprudence, which culminated in Suarez of Grenada, and to which the Protestant

¹ For the Music Chair.

² Grant, vol. i. p. 169.

writers who followed them owed more than they were willing to acknowledge. It is possible that the teaching of Alberico Gentile at Oxford may not have been wholly unheeded in Scotland; but though Gentile was a protestant he was not much of a philosopher, and it was to Grotius and his followers, unquestionably, and to the intimate relations which then subsisted between the intellectual life of Scotland and of Holland, that we were indebted for our introduction to the study both of scientific jurisprudence in general, or natural law as it was called, and of the law of nations. It was from this source that Lord Stair drew the inspiration which enabled him to bring science to bear on our municipal system with a definiteness of conception and clearness of expression which has never since been equalled by our text-writers; and it has always seemed to me probable that it may have been at Stair's suggestion that this particular chair, if not the Faculty of Law itself, was founded. Stair's great work was published in 1681 and he died in 1695, twelve years before the foundation of the Public Law chair; and there consequently can be little doubt as to the correctness of Sir Alexander Grant's conjecture that it was to the great Carstairs—'Cardinal Carstairs' as he was called—who was Principal of the University from 1704 to 1715, that we owe it more directly. Still it is worthy of remark that Stair went to Holland in 1682, and Carstairs returned to Holland after his secret mission to Scotland in 1685, and that they both remained in Holland till 1688 when they returned with the Prince of Orange. From 1685 to 1688 these two remarkable men were together, and in constant personal intercourse, in Holland. Both were philosophers, theologians, and politicians, and Stair could scarcely have failed to point out to Carstairs the relation between these subjects of common interest and his own specialty as a jurist; whilst Carstairs, who had studied at Utrecht, would be able to explain to Stair the arrangements by which this relation was recognised in the Dutch Universities. There was another Scottish exile of distinction in Holland at this time, who also formed one of the party that landed at Torbay, viz. Robert Dundas the second Lord Arniston; and it is interesting to reflect that during the long and stormy passage the three Scotsmen may have talked over the prospects of Scottish jurisprudence in the intervals between the political and ecclesiastical discussion which no doubt mainly occupied them. Dundas was not a man of the same intellectual calibre as Stair or Carstairs, but he was a man of cultivated and scholarly tastes; and as he lived till 1729, his Dutch experiences may have enabled him to aid Carstairs with his counsels.

But from whatever direction the influences may have come which led

to the formation of the Faculty of Law, we are not left to conjecture as to the School of Jurisprudence of which this particular chair was an offshoot. One of the students in this class found in an old book-stall, and kindly brought to me, the curious little book which Sir Alexander Grant has described in a note¹. It is a compendium of Grotius's *De Jure Belli et Pacis*, by William Scott, who was one of the regents at the time. It is dedicated to the Lord Provost and Town Council, and on the copy in the library is written *ex dono Authoris, 4^{to} Aprilis, 1707*. 'In a Latin preface Scott tells us that the book had been printed for the use of a private class, to whom he had previously dictated its contents as a preparation for wider studies, and he gives in full his opening address delivered in his private class-room (*in auditorio privato*) on the study of Grotius. This shows,' Sir Alexander continues, 'that there was some little demand among the students of the college for lectures on the Law of Nature and Nations. It is possible that Carstairs may have suggested the delivery of these lectures, as a first step towards the foundation of a chair. But under the circumstances it is remarkable that the chair when founded should have been given to Areskine and not to Scott.' The coincidence between the date of the publication of Scott's book and the foundation of the chair, 1707, may be taken, I think, as indicating that Scott was a candidate for it. Its dedication to the Town Council seems to show that it was on their influence that he relied; and their leaning in his favour may have had something to do with the bitterness with which they resented what they regarded as the high-handed action of the Crown in placing Areskine in the University without their consent.

From all these circumstances, I think, you will not doubt that when this chair was ultimately founded in 1707 its object, as Sir Alexander Grant has said, was to provide 'a scientific and philosophical basis for a future Faculty of Laws, in imitation perhaps of the Dutch Universities².' The School of Grotius was that which was then uppermost in the minds of Scotsmen, and the Faculty of Law from the first was manifestly intended to cover the whole field of Jurisprudence and to embrace legislation as well as jurisdiction.

1. Its first occupant was CHARLES ARESKINE, or Erskine, of Tinwald, 1707-1734. He came of a race, or rather I ought to say of races, which had been distinguished in the law long before him and continued to be so long after him. 'His grandfather, the Honourable Sir Charles Erskine of Alva, fourth son of John Earl of Mar and of Lady Marie Stewart, daughter of the Duke of Lennox, married Mary Hope, second daughter of Lord Advocate Sir Thomas

¹ Vol. i. p. 233.

² Ibid.

Hope. Of this marriage was born Sir John Erskine of Alva, father of the Professor. His mother was Christian, daughter of Sir James Dundas of Arniston. Erskine is said to have studied for the Church; but he soon abandoned the idea of taking orders. When only twenty he was appointed one of the Regents of the University of Edinburgh. He held this office, in which he taught Logic, Ethics, Metaphysics, and Natural Philosophy, until 1707, when he was made Professor of Public Law¹. It is not quite fair to say, as Sir Alexander Grant has done, that there is no indication of his having taught except 'a brief inaugural address, written in Latin, upon God as the fountain of Law².' Mr. Omond, in a note, gives the following advertisement from the Scots Courant of 12th to 14th November, 1711: 'Mr. Charles Erskine, her Majesty's Professor of Public Law in the University of Edinburgh, designs to begin his private Lectures on the Laws of Nature and Nations, on Friday next at 5 o'clock in the afternoon, at his lodgings in Fraser's Land³.' What came of this pious design I cannot tell, but I fear it must be admitted that Areskine was not a very zealous professor. Immediately after his appointment he went to Utrecht to study law. This may have been in order to prepare for the duties of his chair, as well as with the view of his admission to the Bar; and his being abroad during the Jacobite rising in 1715, in which several of his kindred came to grief, was a proof of his political discretion, and no disproof of his professorial zeal. His subsequent travels with his brother Robert, physician to Peter the Great, when he wrote to his wife that 'she must be thinking he had taken service with the Czar of Muscovy,' may have been very instructive to him as an international jurist. But any aspirations after distinction in that capacity which he may originally have cherished were speedily extinguished by the temptations held out to him by his professional success and the Court-favours which he owed to his family connections, and still more to the patronage of the great Duke of Argyll. His reluctance to sever himself from an office which brought him in contact with the philosophical studies of his youth may probably have been the cause of his continuing to hold the chair for the long period of twenty-seven years. But how incompatible the discharge of its duties must have been with his other avocations will be seen from Mr. Omond's narrative of his subsequent career. He was called to the Bar on the 14th of July, 1711. In 1714 he was an Advocate Depute. He became one of the leaders of the Bar; purchased the estate of Tinwald in Dumfriesshire; and in April, 1722, was returned to Parliament as member for that county.

¹ Omond's *Lord Advocates of Scotland*, vol. ii. p. 1.

² Grant, vol. ii. p. 314.

³ *The Lord Advocates of Scotland*, vol. ii. p. 1.

In May, 1725, when Forbes became Lord Advocate, Erskine was appointed Solicitor-General. On this occasion he received a special mark of royal favour. Hitherto the only Counsel allowed to be placed within the bar had been the Lord Advocate; but on this occasion a change was made. The new Solicitor-General presented to the Court a warrant under the sign-manual, subscribed by the Secretary of State for Scotland, in these terms: 'Whereas we have appointed Mr. Charles Areskine, advocate, to be sole Solicitor for that part of Great Britain called Scotland, and we being pleased to show him a further mark of our royal favour, it is our will and pleasure that a seat be placed for him within the bar of your Court, where and from whence he may be at liberty to plead cases in your presence; and we do hereby direct you to cause such to be placed accordingly.' At the general elections of 1727 and 1734 he was returned for Dumfriesshire. In 1737 he succeeded Forbes as Lord Advocate, and strenuously supported the Scottish policy of the Walpole ministry till 1741. At the general election of that year Sir John Douglas of Kelhead became member for Dumfriesshire; and Lord Advocate Erskine was returned for the Sutherlandshire district of burghs. His election was, however, declared void in the following year, and he resigned office. His successor was Robert Craigie of Glendoick, to whom he wrote the following pleasant letter of congratulation: 'It's commonly believed we love our heirs but not our successors, and sometimes we don't our heirs because they are to be our successors. However this is not the case with me; you have been mentioned to the King by the Marquis of Tweeddale as my successor, and I heartily agree to it, and wish you success and prosperity in the office. You are happy in having to do with a patron who is a man of truth and honour, and this is a great encouragement to you. To show I'm sincere in all this, I have used my best endeavours you should be elected in my room, the election being found void.' 'He returned to practise at the bar; but there was a vacancy on the bench in November, 1744, and he received the appointment. Four years later he succeeded Fletcher of Milton as Lord-Justice-Clerk; and died, after filling that post to the satisfaction of the country, in April, 1763¹.' 'As a lawyer,' says Mr. Fraser Tytler², 'he was esteemed an able civilian. He spoke with ease and gracefulness, and in a dialect which was purer than that of most of his contemporaries: as a judge his demeanour was grave and decorous, and accompanied with a gentleness and suavity of manners that were extremely ingratiating.'

¹ The Lord Advocates of Scotland, vol. ii. p. 1 et seq.

² Life of Lord Kames, p. 38.

2. WILLIAM KIRKPATRICK, 1734-5. Areskine was succeeded by his son-in-law, William Kirkpatrick, third son of Sir T. Kirkpatrick, second baronet of Closeburn. He sat in Parliament for the Dumfries Burghs from 1725 to 1747. In the latter year the Duke of Queensberry received compensation for his heritable Sheriffship and William Kirkpatrick was appointed to the office. He died in 1777. He married Jean, third daughter of his predecessor. It is thus obvious that the chair was vacated by Areskine in his son-in-law's behalf when he himself was Solicitor-General and when that son-in-law was Sheriff of Dumfriesshire and member for the Burghs. Mr. Kirkpatrick's son took the name of Sharpe on succeeding to the Hoddam estates, and was the well-known wit and antiquarian Charles Kirkpatrick Sharpe. William Kirkpatrick held the chair only for one year, and I grieve to say the solitary fact connected with his tenure of it that has come down to us is that he sold it to his successor for £1000. How nobly one of his descendants is atoning for the academical shortcomings of his ancestor I need not tell you¹.

3. GEORGE ABERCROMBY, OF TULLIEODY (1735-1759), was a country gentleman of good family. He was born in 1705, and died in 1800, within a few weeks of the completion of his 95th year. He was the father of General Sir Ralph Abercromby, and the grandfather of Lord Dunfermline, and he is represented by the present Lord Abercromby. Like his father he was called to the Bar, and they both lived to become its oldest members; but he never practised. Of his professorial career of fifteen years we know very little. Lord Dunfermline, in his *Life of Sir Ralph*, says that 'during several sessions Mr. Abercromby gave lectures in the University on the Law of Nature and Nations,' and Sir Alexander Grant says that in 1741 he was lecturing on Grotius. How long he lectured we do not know. His grandson says he was 'distinguished for his industry, his love of knowledge, and his vigorous and comprehensive understanding.' Notwithstanding these good qualities, however, he probably did not succeed as a lecturer. Scotch students are apt to become impatient of a professor who condescends to mere tutorial work, and, if Abercromby had nothing of his own to tell them, it is not surprising that they should have tired of his prelections on Grotius. In 1750 he made over the chair to his son-in-law, Robert Bruce; whether for a pecuniary consideration or not does not appear.

4. ROBERT BRUCE, OF KENNET, 1759-1764. Of Mr. Bruce as a professor we know nothing. He held the chair for only five years, and

¹ John Kirkpatrick, Professor of Constitutional Law and History.

was raised to the bench by the title of Lord Kennet. He was great-grandfather of the present Lord Balfour of Burleigh. Whether he lectured or not I have been unable to discover, but as he is said to have had the character of being an unusually pure, painstaking, and conscientious judge, at a time when these qualities were not so common as they are now, it is scarcely probable that he held an office the duties of which he made no effort to perform. He died in 1785.

5. JAMES BALFOUR, OF PILBIG, 1764-1779. He too was a country gentleman, and lived in the fine old castellated house, between Edinburgh and Leith, which we all know. Nor has his shadow in this respect grown less, for though his representatives have not, like those of his two immediate predecessors, reached the peerage, they have retained their position, and have recently had a large accession to their fortune. But Balfour was more than a Scotch laird; he was a Scotch philosopher; and if any Scottish Raphael should paint us a picture of the School of Modern Athens, his figure would appear in the background, behind the grander images of Stewart and Ferguson and Hamilton and Hume. In his relations with the latter his name crops up in all the histories, and if I were dealing with the chair of Moral Philosophy, which he held from 1754 to 1764, I should have a good deal to say of him, in connection both with Hume and with Lord Kames. As Professor of Moral Philosophy Sir Alexander regards him as having been simply a failure, and his removal to the chair of Public Law in order to make way for Adam Ferguson—an arrangement which was effected by one of those scandalous transactions of buying and selling of which there were so many instances—must have been a prodigious gain to the University. But though 'there seems little reason to doubt that Balfour was not a brilliant professor¹' nor a brilliant man, his contemporaries spoke of him with far greater respect than the anonymous writer in the *European Magazine* in 1783, from whom Sir Alexander's conception of his character seems to have been chiefly derived. In speaking of his criticisms of Lord Kames's views on liberty and necessity, Mr. Fraser Tytler says: 'It is with pleasure we remark that the author of "Philosophical Essays" has afforded an example of a candid, liberal, and truly philosophic spirit of enquiry².' 'Mr. Balfour was likewise the author of *A Delineation of Morality*, and a small volume entitled *Philosophical Dissertations*. The principal object of these works is an examination of the doctrines contained in David Hume's *Essay on Human Nature*, and his *Inquiry concerning the Principles of Morals*. The strongest testimony to the merits of Mr. Balfour is that of

¹ Grant, vol. ii. p. 338.

² *Life and Writings of Lord Kames*, vol. i. p. 141.

Mr. Hume himself.' Mr. Tytler here refers to a curious letter from Hume to Balfour, the studied urbanity of which however, as it seems to me, only partially hides a vein of sarcasm more characteristic of the writer than complimentary to the recipient.

Balfour was no match for Hume, and his writings possess no absolute or permanent value. But whatever were his other qualities, his industry, at all events, must have been considerable, for during almost the whole of the ten years that he held the chair of Moral Philosophy, from 1755 to 1761 he also acted as Sheriff-Substitute of Edinburgh. Even so late as 1764, the year in which he was transferred to the chair of Public Law, traces of him are to be found in the Diet Books of the Sheriff's Court¹.

It is singular that the resignation of his judicial office should apparently have been co-incident with his transference from the Faculty of Arts to the Faculty of Law in the University, and it is disappointing to find no proofs of his activity as a jurist, either academical or scientific. The author of the notice of him in Stephen's 'National Biography,' who is I believe a connection of the family, makes no mention of his having lectured on Public Law at all, though he adds two facts of some interest to what was otherwise known of him, namely, that he studied at Leyden, and that his mother was a grand-aunt of Sir William Hamilton. But not much of the genius of that great man can be claimed for him, and I fear we must be contented to sum up his character with Mr. Fraser Tytler's statement that he was 'an ingenious, modest and worthy man, who spent a long life in the practice of those virtues which it was the object of his writings to inculcate².'

6. ALLAN MACONCHIE, OF MEADOWBANK, 1779-1796. With the possible exception of Areskine, Maconochie was the ablest man who ever filled the chair, and he is the only one to whom posterity gives credit for having lectured with success, even for a time. Lord Cockburn, who knew him only in later life, was estranged and bewildered by the metaphysical turn of his mind, and is a somewhat unwilling witness in his favour. He does not mention him as a professor at all, and, even as a judge, does not speak of him in terms of such enthusiastic admiration as Lord Brougham and Lord Jeffrey. Still the sketch of his intellectual character he has given us shows how exceptional must have been his qualifications for an academical appointment, and, above all, for the academical appointment which he held.

'His peculiar delight and his peculiar power,' Cockburn says, 'was in speculation; chiefly as applied to the theoretical history of

¹ Letter from Sheriff Rutherford, 5th October, 1887.

² Life of Lord Kames, vol. i. p. 140.

man and of nations. He acquired great skill in the use of his metaphysical power, both as a sword and as a shield, in the intellectual contests in which it was his delight to be always engaged. He questioned everything; he demonstrated everything; his whole life was a discussion. This, though sometimes oppressive, was generally very diverting, and gave him a great facility in detecting and inventing principles, and in tracing them to their sources and to their consequences. Jeffrey described this very well when he said that while the other judges gave the tree a tug, one on this side and one on that, Meadowbank not only tore it up by the roots, but gave it a shake which dispersed the earth and exposed the whole fibres¹.

How long Maconochie taught it is difficult to determine. Bower, who is confirmed by other authorities, says he lectured only for two sessions, owing to the extensive increase of his practice at the Bar. But it seems scarcely likely that he abandoned a task which must have had great attractions for him, and for which he had taken the trouble to prepare a course of lectures, on so short a trial. He knew, indeed, but too well, that he could hold the chair as a sinecure, and could thus reimburse himself for the £1532 18s. 2d. which was the sum he paid for it to Balfour. But he can scarcely have been the man his contemporaries took him for, if, at such a period of history as the seventeen years of his tenure of the chair covered, he was willing to exchange the interests of science and of mankind for those of his clients in the Parliament House, even with the ultimate temptation of a seat on the Bench. We are told that he did not succeed in attracting a class, and this Lord Jeffrey ascribed to the unintelligible or, at all events, unteachable nature of the subject—a subject which, with all his brilliancy, I fear neither Lord Jeffrey himself nor the Commissioners to whom he addressed his observations understood. ‘Mr., afterwards Lord Jeffrey,’ says Sir Alexander Grant, ‘told the Commissioners of 1826 in reference to the Chair of the Law of Nature and Nations, “It was taught by a succession of able persons in this University, among others by the late Lord Meadowbank, than whom no man was more full of discursive knowledge and originality; yet in his hands, as well as in those of his successors, it proved in practice a complete failure, so that they could hardly get through the course with a larger attendance than is now round the table of the Commissioners”².’

Had Lord Stair been in Lord Jeffrey’s place he would have given a very different account of the affair. Bringing his own philosophical instincts and his acquaintance with foreign schools of learning

¹ Cockburn’s Works, vol. ii. p. 124.

² Grant, vol. ii. p. 316.

to bear on it, he would have told the Commissioners that the conditions on which the experiment had been tried in the University of Edinburgh were not such as to render success possible. The subject, which he regarded as the very root of jurisprudence on which Carstairs designed that the Faculty of Law should be based, had never been recognised even as a branch of any organised system of legal teaching whatever. Its study was not imposed as a condition for admission to the Bar; still less, of course, to the other branches of the profession. Shallow and thoughtless wittlings, led astray by Rousseau and his followers, made stupid jokes about the *jus naturale*, the meaning of which they ought to have learned from the Roman jurists whom they pretended to have studied, and the chair was openly bought and sold with the consent of the Lord Advocate and the Town Council. Maconochie thus fell on a thankless and unappreciative, though an admiring generation, and the spirit of the age, against which he was not strong enough to struggle, had probably more to do with his failure than either the intrinsic character of his subject or his own hungering after the loaves and fishes of the Parliament House. Had half the salary which he received as a judge been offered to him as a professor, had he been consulted by Government on questions of International Law, or occasionally employed as a jural assessor in the negotiation of a treaty, as is the custom on the Continent, and had the ultimate prospect of such honours as are now conferred on physicians and physicists and philanthropists been held out to him, he might have remained in the University all his days, and left a name in Scientific Jurisprudence as cherished in Scotland as that of Stair himself, and far more widely known. But let us not dwell regretfully on might-have-beens that were not to be. By preventing as a judge the candle of principle from being hid under the bushel of precedent in the Parliament House, Maconochie did good service in his day, and his judgments still enjoy professional consideration. But as a teacher of science, all that remains of him is the following sketch of his course in Hugo Arnot's History of Edinburgh:

‘Mr. Maconochie destines his course for gentlemen who have nearly completed their education at the University, on the most liberal plan. He traces the rise of political institutions from the natural characters and situation of the human species; follows their progress through the rude periods of society; and treats of their history and merits, as exhibited in the principal nations of ancient and modern times, which he examines separately, classing them according to those general causes to which he attributes the principal varieties in the forms, genius and revolutions of governments. In this manner he endeavours to construct the science of

the spirit of laws on a connected view of what may be called the natural history of man as a political agent; and he accordingly concludes his course with treating of the general principles of municipal law, political economy, and the law of nations¹.

We may here, I think, find traces of Montesquieu, and, apart from the influence which his frequent residences in France must have had upon him, it is not wonderful that Montesquieu's teaching should have been supplanting that of Grotius in his mind, when we consider that Europe had just been flooded with twenty-two editions of the *Esprit des Lois* in eighteen months after its publication. The lectures, I believe, are in the possession of the Meadowbank family, and it seems worthy of consideration whether they ought not still to be given to the world. Their intrinsic value may have been lessened by time, but they could scarcely fail to be important contributions to the history of opinion. Like the other celebrities of his time, Maconochie appears in Kay's Portraits. His physiognomy is grave and thoughtful, and one can well imagine must have been felt as somewhat 'oppressive' by so gay a spirit as Cockburn's. Kay has also a pretty elaborate notice of him, and it is interesting to us to know that he was one of the founders of the Speculative Society, to which many of us owe so much. On being raised to the Bench he took the title of his estate, as is the custom in Scotland, and was the first Lord Meadowbank, his son Alexander, in accordance with the well-known jest, having been Lord Meadowbank 'also, but not like-wise.'

7. ROBERT HAMILTON, 1796-1832. Though Lord Jeffrey spoke of Maconochie's successors he can scarcely be said to have had a successor at all; for Mr. Hamilton neither taught, nor, apparently, was expected to teach. The Bishop's teinds on which the chair depended for its endowment having been mostly carried off by augmentations to the stipends of the ministers in the parishes on which they were allocated, an annuity of £200 a year was granted him from the Consolidated Fund. But this did not bring the salary up to its original value, and Hamilton was permitted to hold the chair as an acknowledged sinecure for the rest of his days. On his death in 1832 no new appointment was made, and thus the chair from which it was intended that the Faculty of Law should take its tone, and by means of which it was expected that it would assert its place in the scientific world, was consigned for the next thirty years to the lumber-room of the University. There is no reason to suppose that where Maconochie failed Hamilton could have succeeded, but under more favourable conditions success, even in his

¹ Arnot's *Edinburgh*, p. 305.

case, does not seem to have been impossible. He is said to have been a considerable antiquarian, and, along with his friend Sir Walter Scott, was one of the principal Clerks of Session. I believe he was a Hamilton of Gilberscleugh and was connected with the Belhaven family.

Such then, gentlemen, is a brief and imperfect sketch of the fortunes of this chair and of the characters of its occupants. They were all men of ability who succeeded in other and, to them, more tempting careers. Three of them, as we have seen, became judges of the Court of Session, and one of these rose to the dignity of Lord Justice Clerk. Two, if not more, were members of Parliament. They were all cultivated gentlemen, two having had the special qualification of having previously been Professors of Moral Philosophy. Lastly,—what was an element of success of greater value in their day than in ours,—they were all men of family, and two of them are now represented by peers.

Strange as was the method of their appointment, moreover, there was not one bad appointment amongst the whole of them. There was not one of them who, under other conditions, might not have made a creditable professor, and there were two of them who, had they persevered, there is every reason to believe would have distinguished themselves as philosophical and international jurists. But they did not persevere, no one persevered, no one succeeded, and the consequence was that when I was appointed, in 1862, I had neither precedents nor traditions to guide me.

Nor was this defect supplied by the instructions which I received. The Ordinance of the Commissioners, it is true, was simple and intelligible. All that I was called upon to do was to deliver forty lectures on International Law during the Winter Session. For this light task the not inadequate remuneration of a salary of £250, together with such fees as I might be able to gather, was assigned to me. But, on the other hand, by the commission which was issued to me by the Crown, I was appointed 'Professor of Public Law and of the Law of Nature and Nations,'—the old title of the chair, after mature deliberation, I was told, having been, wisely as it seemed to me, retained. No less than four branches of the science of Jurisprudence of great importance, each of which in fully equipped Faculties of Law is represented by a separate course,—viz. (1) Public Law, the *Jus Publicum* of the Romans, the *Staatsrecht* of the Germans, what we loosely call Constitutional Law; (2) Natural Law, the *Jus Naturale*, the Philosophy of Law, or Jurisprudence in its general and more strictly scientific sense; (3) the Public Law of Nations, *Jus inter Gentes*; and (4) Private International Law, the *Jus Gentium*,—were thus handed over to me.

Of the first, which had given its name to the chair, Public Law, I felt at once that I was relieved by the institution of a Professorship of Constitutional Law and History; and, though in some aspects it had hitherto been my favourite study, I consigned it, except in so far as it might be necessary to go into it for international purposes, without reluctance to my eminent colleague Professor Cosmo Innes. But there still remained the Philosophy of Law and the Public and the Private Law of Nations.

Many esteemed friends in the Parliament House recommended me to confine myself to the latter subject, as that which was of the greatest practical importance and most likely to attract a class. Against this temptation I at once closed my ears. I was deeply impressed with the importance of the Philosophy of Law as the foundation of Jurisprudence in all its branches. I had already made preparations for a treatise which I had intended to publish on the subject, and now that I had become its academical representative I was resolved to teach it, better or worse, as ability might be granted me. This resolve was strengthened by the further consideration that the two branches of Positive Law I was subsequently to teach rested on it in a special sense, and that the founders of the chair, under the guidance of Carstairs, had adhered to what might be called the tradition of the Fathers, and had coupled the Law of Nations with the Law of Nature.

But how was all this to be accomplished? That I should dispose of three such subjects in forty lectures, with such a measure of completeness as to give any real academical value to my teaching, was plainly impossible. The only course left open to me was that, with the consent of the *Senatus*, I should abandon the easy lines which the Commissioners had traced for me, and accept the burden of a regular winter course of five days a week. Permission to adopt this arrangement was readily granted me, on condition that my fee, £3 3s., should not be increased; and I must, consequently, have delivered about a thousand gratis lectures. I mention this latter fact, not for the purpose of enhancing the value of my own services, which may or may not have been increased by the larger space over which I found it necessary to extend them, but in order to indicate the amount of labour which will fall to my successor should he feel himself under a similar necessity, and which he may not be willing to perform on the same conditions. In my own case the sacrifice involved in the exclusive devotion of my time and energies to the duties of the chair was not considerable. The occupation was the most attractive one that could possibly have been assigned to me, and, if the pecuniary remuneration was scanty, my ambition was stimulated by the reflection that the position opened avenues to a

wider and perhaps more permanent reputation than any other within the range of the profession. Though not without much anxiety and many misgivings, I consequently entered with zeal and hope on what was to so great an extent a self-imposed task, and to the pride and pleasure which I have all along felt in its discharge I ascribe the comparative success which has attended my efforts. In the hands of my far abler predecessors it was a secondary occupation, which they took up or laid down as the exigencies of practice rendered possible or convenient, and to this circumstance, as I have said, far more than to either the unattractiveness of the subject or their inability to teach it, is, in my opinion, to be ascribed their failure to obtain for it a permanent place in the University and the recognition of the profession. It is to be remembered, moreover, that attendance on the class in their time was wholly voluntary, whereas on my appointment it was made compulsory for the LL.B. degree, and in 1886 was imposed by the Faculty of Advocates on all entrants to the Bar.

Notwithstanding the gloomy forebodings of my professional friends, the philosophical portion of the course proved from the first to be the most attractive to the students. Students of theology and others frequently came solely on account of it; the attendance on it was always more regular than on the other branches, and in it the best examination papers and the best essays were written. The reason of this I believe to have been that, in addition to the naturally thoughtful and earnest character of Scotsmen, our Scottish students are specially well prepared for this branch of study by the excellent training in Logic and Ethics which they receive in our Faculties of Arts. In this respect it has always appeared to me that our M.A.s contrast favourably with English graduates, and I regard it as a reason why we should be very careful in interfering with the curriculum for our Arts degree. As a preliminary to the degree of LL.B., at all events, I am decidedly of opinion that no Arts degree from any University ought to be accepted which does not embrace Logic and Ethics. In these, as in other branches of knowledge, men of brilliant ability and of exceptional industry will, no doubt, supply the defects of their early education; but, as regards the majority of students, it is simply impossible to teach them scientific jurisprudence unless they bring a reasonable acquaintance with these ancillary subjects along with them. The students who attend the class of Public Law, having for the most part already graduated in Arts, and all of them being grown men, I have always treated them as friends and fellow-workers, and no words could be too strong to express the consideration and courtesy with which they have invariably behaved to me.

In dealing with the chair in future, two courses manifestly suggest themselves for consideration. Either it may be retained substantially on its present footing as a single chair, or it may be broken up into two or three separate chairs or lectureships, as in the Continental Universities. In favour of the first course there is perhaps most to be said. Premature specialising is the curse of our present academical life, and as few students would be willing to attend additional lectures, unless the whole subject were presented to them in a single course, there would be great risk of their becoming imperfect and onesided specialists in one or other of its branches, before they had got a grasp of the general principles which govern them all. There is, of course, no theoretical obstacle that stands in the way even of Private International Law, which is the narrowest of the three branches, being taught in such a manner as that an absolute basis should be given to each doctrine, and science made to shine through it at every step. But, practically, we know that this would not be done, and that, if it were done, it probably would not be intelligible to those who had made no previous study of Jurisprudence as a whole. The same remarks apply to the Public Law of Nations with even greater force, because its rules are less definite, and from the want of any central authority by which they can be enforced, it leans even for its executive factor on the Law of Nature.

The most perfect arrangement, no doubt, would be that the present chair, embracing the three subjects in a single course, should be retained for purposes of general instruction, attendance on it being imperative for the LL.B. degree, and for the Bar, as at present, and extended to Writers to the Signet, a good many of whose apprentices have been voluntary students in recent years; and that, alongside of it, there should be established three separate courses, one on each of the three subjects, on which attendance should be voluntary. But such a scheme is far too ambitious for this country, and as regards the Philosophy of Law and the Public Law of Nations, at all events, we may at once dismiss the notion of their being established with such endowments as to induce men of ability to accept them, whilst at the same time the present chair is maintained.

The endowment of a lectureship on Private International Law, on the other hand, appears to me to be by no means an impracticable scheme. As it need not interfere with the professional prospects of the lecturer, it might be held by a succession of junior members of the Bar; and as it would demand no special gifts or acquirements which could not be turned to practical account, an endowment of £150 or £200 a year would probably be sufficient.

To the attempt to introduce separate courses of the Philosophy of Law and of the Public Law of Nations there are other objections, in addition to the financial one I have mentioned. A course devoted exclusively to the Philosophy of Law would, probably, drift away into those abstract and subtle metaphysical speculations the bearing of which on Positive Law is of too indefinite and disputed a kind to render them acceptable in this country, and which even in Germany, in recent years, have almost banished the subject from the academical arena. As regards the Public Law of Nations, a separate course, occupied as it must be in a great measure with the history of treaties and with the details of diplomatic arrangements, would be wholly useless except in conjunction with a school of diplomacy, the establishment of which in Edinburgh would be a matter of great if not insuperable difficulty.

For these and other reasons—amongst which I would mention the unsettling effect of all changes and the difficulty with which new institutions are established—it humbly appears to me that the wisest course would be to retain the existing chair very much on its present footing. Even if a lectureship on Private International Law were established, I would not relieve the Professor from the duty of teaching that subject, because, as Professor of Jurisprudence, it would belong to him to determine its scientific character, and, as Professor of International Law, to assign to it its place as a subsidiary doctrine to the fundamental doctrine of recognition.

But, if the present chair is to be retained with any reasonable guarantee for its permanent success, I have one word to say about it which I could not have said with equal freedom twenty years ago—it *must be better endowed*. No one can feel more keenly—few probably even of my many gifted pupils ever felt so keenly as I have all along done myself—how much was lacking to me in the qualifications demanded by the position which I occupied. I am very far from insinuating that my poor services have not been adequately remunerated, or that I had personally the slightest claim to the honour and consideration with which Continental nations and the Americans are in the habit of treating their international jurists. But I know the position, I know the high and rare qualities which its occupant ought to possess, and I say without hesitation that no succession of men possessed of these qualities can be secured and retained on the conditions on which it has been held by me, still less on those on which it was held by my predecessors. Sir A. Grant has said of it that ‘it could only have been made attractive to the students by a man of genius who devoted himself to expounding the Philosophy of Law. Whereas the chair

has been held by a succession of advocates who were engaged in successfully pushing their way to the Scottish Bench, and who naturally treated their academical position and duties as of minor importance. It is no wonder then that the chair was a failure¹.

A succession of men of genius can never be secured for any office. No chair in the University ever had that advantage, and it may be that no man of genius ever occupied the chair of Public Law at all, though, in the opinion of his contemporaries, Maconochie, as we have seen, came very near to that character. Of Areskine, its first occupant, we know less, but it is hard to believe that a man who was a Regent of Philosophy at twenty-four, who seven years after chose as the subject of his inaugural address 'God as the Fountain of Law,' and who ended his brilliant professional career by rising to the second highest place on the judicial bench, was deficient either in the philosophical gifts or the energy of character requisite to have made him not only an efficient professor but a distinguished scientific jurist, had the inducement been sufficient. To both of these men the world-wide reputation and permanent fame enjoyed by men like Grotius, or even by such lesser lights as Alberico Gentile, Puffendorff, or Vattel, must have had their charm. But the charm was not sufficient to compensate for the sacrifice of wealth and local consideration which it involved; and unless some means are adopted to diminish this sacrifice in future, no succession of able professors need be looked for, and Scotland can never take the place in scientific jurisprudence which belongs to her in virtue of the thoughtful and speculative genius of her people.

The claim for more liberal endowments and more generous recognition of this particular chair is strengthened by another consideration with which I shall conclude these remarks, which have already run to a greater length than I contemplated. General Jurisprudence and International Law are branches of science which must draw their nourishment almost exclusively from Continental sources. The professor of International Law must be himself an internationalist. He must not only know foreign languages and read foreign books, but he must know foreigners and foreign nations, otherwise he will see everything through the distorting medium of local feelings and prejudices. If he is an enthusiast in his science, moreover, it is to his Continental colleagues that he must look for sympathy and companionship, and for escape from the intellectual isolation to which, for the present at all events, he will be here condemned. Having received a portion of my own education abroad I had some advantages in these respects, and yet there is nothing I regret more than not having spent my holidays on the Continent

¹ Vol. ii p. 316.

during the earlier years of my tenure of the chair, and gone into academical and political society abroad to a greater extent than I did. When my Continental colleagues did me the honour of inviting me to take part in founding the Institute of International Law in 1873, a large increase took place in my Continental acquaintance, and this has led to much charming intercourse, both social and scientific. But I was by that time too far advanced in life, and my health was too shattered, to admit of my availing myself fully of the privileges they offered me. I have only been present at three meetings of the Institute, and have taken little part in its labours. Through its means, however, I have been brought into contact with all the leading international jurists of the day; and I am convinced that nothing is more important for a Professor of the Law of Nature and Nations, be the sphere of his local activity what it may, than a constant interchange of publications and letters, and of occasional visits with the class of men who constitute the Members of the Institute. With a view to this, however, he ought to be in such circumstances as to render the expenses of his journeys and the immediate remuneration he may receive for his publications a matter of comparative indifference, and to enable him to return the hospitalities he will receive. In order that he may discharge his public duty in an efficient and becoming manner, he must be able both to travel abroad and to live at home like a gentleman; and it is not quite fair to expect that, in addition to sacrificing his professional prospects, he is to do all this out of his private means.

But, apart from all higher and wider considerations, there is an aspect of the affair which can scarcely fail to appeal to those who know the circumstances of many of the junior members of the Bar, from whose ranks the professors must necessarily be chosen. The whole emoluments of the chair, even including the £150 of Bishop's teinds recovered in 1881, have never, with the exception of the last and present sessions, quite reached £500. From a merely pecuniary point of view it is thus inferior to the smallest Sheriff-substituteship; and whilst this continues to be the case, it is obvious that no man of ordinary prudence will accept it, unless he either has at the time, or, at all events, has the prospect of inheriting, some considerable amount of private means. It is a conspicuous as well as an important appointment, which no conceivable increase to the size of the class can ever render self-supporting. To a poor man it would be a 'white elephant,' and the man and the elephant would starve each other. It is surely needless, in these democratic days, to enlarge on the disadvantages of thus limiting the area of choice to the comparatively wealthy.

J. LORIMER.

PUBLIC MEETINGS AND PUBLIC ORDER.

II. BELGIUM.

I.

PARMI les libertés que la Constitution belge garantit aux citoyens, celle qui se lie le plus intimement à la liberté individuelle est sans contredit le droit de réunion. 'Les belges,' dit l'art. 19 de la Constitution, 'ont le droit de s'assembler paisiblement et sans armes, en se conformant aux lois qui peuvent régler l'exercice de ce droit, sans néanmoins le soumettre à une autorisation préalable.'

Cette disposition était en quelque sorte la contrepartie du régime que la domination française avait introduit en Belgique, et qui avait trouvé son expression caractéristique dans les articles 291 et 294 du Code pénal de 1810, qui prohibaient toute association de plus de vingt personnes dont le but serait de se réunir à certains jours marqués ou tous les jours pour s'occuper d'objets religieux, littéraires, politiques, ou autres, sauf l'autorisation du gouvernement et sous les conditions qu'il plairait à l'autorité publique d'imposer à la société; et qui punissaient d'une amende de frs. 16 à frs. 200 les chefs, directeurs ou administrateurs de l'association ou même tout individu qui, sans la permission de l'autorité municipale, aurait accordé ou consenti l'usage de sa maison ou de son appartement, en tout ou en partie, pour la réunion des membres d'une association même autorisée.

La Constitution belge a fait échapper au régime de l'arbitraire administratif la liberté de réunion et son corollaire, la liberté d'association.

Mais le droit de réunion étant établi dans son principe absolu, comme toutes les libertés dont la Constitution garantit l'usage aux citoyens belges, on comprend que la solution des questions qui concernent exclusivement l'exercice du droit dont il s'agit, ait été abandonnée par nos Constituants aux législateurs futurs; on comprend également que les lois à édicter sur ce point, devant être avant tout constitutionnelles, c'est-à-dire, respecter les droits garantis par le pacte fondamental, ne pourraient imposer à l'exercice du droit de réunion des conditions telles que la liberté des citoyens se trouverait virtuellement entravée ou même supprimée.

La Constitution n'a cru devoir mentionner qu'une seule de ces conditions à cause de son existence historique: celle de l'autorisation

préalable. Elle a mis ainsi le législateur dans l'impossibilité de rétablir un régime contre lequel l'art. 19 s'élève comme une éloquente protestation. Hâtons-nous de dire d'ailleurs que nos mœurs se sont parfaitement accommodées de l'exercice le plus large du droit de réunion et que nos gouvernants n'ont jamais eu à recourir à la sagesse du législateur pour régler l'usage d'une liberté qui, sous forme d'assemblées politiques, scientifiques, religieuses, ou de pur agrément, est devenue en quelque sorte partie intégrante de notre vie publique.

II.

La généralité de la règle posée par l'art. 19, dont nous avons reproduit ci-dessus la première partie, comporte cependant une importante exception que le deuxième paragraphe formule comme suit : ' Cette disposition ne s'applique pas aux rassemblements en plein air, qui restent entièrement soumis aux lois de police.' Le droit absolu de réunion et son corollaire, la défense de toute mesure préventive, ne comprennent donc pas en Belgique les réunions *sur la voie publique*. Les lois de police peuvent soumettre ces assemblées à l'autorisation préalable ; elles peuvent, le cas échéant, les interdire entièrement.

Les lois de police sont, en Belgique, comme partout ailleurs, l'expression des nécessités de l'ordre public : elles sont supérieures à toutes les libertés parce qu'elles constituent la garantie du maintien de la sécurité publique, la préservation de l'ordre social contre l'anarchie. Comme l'a dit un de nos magistrats les plus éminents¹, ' Les lois de police avec le caractère instantané que leur imprime l'urgence des circonstances peuvent créer des obstacles qui ont à la rigueur, si on veut, le caractère préventif de ces lois, mais qui sont en réalité et par essence une repression actuelle et nécessaire d'un désordre qui détruirait aveuglément toute liberté quelconque, si bien qu'il est permis d'affirmer par exemple que, dans tel péril social prévu et annoncé, l'obstacle opposé à l'exercice actuel d'une liberté est à la fois un acte de préservation pour cette liberté et un acte préventif temporaire contre l'obstacle coupable et médité.'

On remarquera, ici également, la généralité des termes de la disposition, celle-ci ne faisant aucune distinction suivant la nature ou l'objet du rassemblement. Il importe donc peu quel est le caractère de la réunion en plein air : la police peut, dans tous les cas, la soumettre à certaines formalités, par exemple, à l'autorisation préalable, fixer l'heure et le lieu, et s'il s'agit d'un cortège, d'une procession, déterminer le parcours, ou bien encore défendre purement et simplement le rassemblement. En Belgique, où les questions qui inté-

¹ M. Faider, ancien procureur général à la cour de cassation.

ressent la liberté de la religion catholique ont la spécialité de passionner les esprits, de vifs débats se sont élevés dans la presse, au sein de la législature, devant les tribunaux, sur le point de savoir si, en vertu de la disposition précitée, les actes du culte qui occasionnent des rassemblements en plein air, comme les processions, les pèlerinages, sont soumis aux règlements de police.

On a soutenu que la liberté absolue des cultes et de leurs manifestations extérieures que la Constitution garantit formellement, était incompatible avec les mesures préventives et restrictives que peuvent décréter les règlements en question ; que si l'exercice public d'un acte du culte était de nature à produire des troubles, il appartenait à l'autorité locale, non d'interdire cet acte, mais d'en protéger l'accomplissement et de réprimer les délits qui pourraient se commettre à cette occasion. Mais le pouvoir judiciaire supérieur—la cour de cassation—a rejeté cette doctrine ; elle a répondu aux défenseurs de la liberté illimitée que, du moment que les citoyens descendent dans la rue pour manifester leurs opinions, que celles-ci soient politiques ou religieuses, ils doivent se soumettre aux règles qui régissent tous les rassemblements sur la voie publique et que la Constitution n'a accordé sous ce rapport aucun privilège spécial au culte ni à ses ministres.

Les règlements de police ont pour but, dans l'espèce qui nous occupe, la sûreté et la tranquillité dans les rues suivant l'expression de la loi de 1789. Il suit de là, que les mesures prises par ces règlements relativement à l'exercice du droit de réunion ne doivent avoir d'autre préoccupation que la préservation de l'ordre public et qu'elles doivent, à moins que cet ordre ne risque d'être troublé, respecter le principe de la liberté de réunion. Il est à peine nécessaire d'insister sur ce point. La Constitution, en soumettant les rassemblements en plein air aux lois de police, n'a pas permis aux autorités locales de prohiber d'une manière générale et absolue ces rassemblements ni même de les soumettre de la même manière à la nécessité de l'autorisation préalable. Elle a voulu simplement donner aux autorités en question le pouvoir d'imposer l'autorisation ou de prohiber telle réunion, si le maintien de l'ordre public l'exige.

III.

Le service de la police rentre dans les attributions du pouvoir communal ou municipal (lois de 1789 et 1790 ; loi communale de 1836). C'est, en principe, au conseil communal qu'il appartient de décréter les règlements de police, et par conséquent de prendre, le cas échéant, les mesures que nécessitent les rassemblements en plein air. Toutefois, on comprend aisément que, dans les temps de

troubles, d'émeutes, lorsque l'autorité n'intervient sûrement qu'à la condition d'intervenir rapidement, il est difficile, sinon impossible, de recourir à un pouvoir exclusivement délibérant comme le conseil communal pour prendre les dispositions urgentes que réclament les circonstances. Le bourgmestre, c'est-à-dire le chef responsable de la commune, celui qui en représente le pouvoir exécutif, est le seul qui soit à même de faire face aux événements avec la rapidité nécessaire. Aussi la loi communale dispose-t-elle 'qu'en cas d'émeutes, d'attroupements hostiles, d'atteintes graves portées à la paix publique ou d'autres événements imprévus, lorsque le moindre retard pourrait occasionner des dangers ou des dommages pour les habitants, le bourgmestre pourra faire des règlements et ordonnances de police à charge d'en donner immédiatement communication au conseil' (art. 94¹). Le bourgmestre a donc le droit d'intervenir directement et personnellement pour défendre les rassemblements en plein air, les attroupements sur la voie publique, et c'est ce qu'il a fait dans l'affaire des processions jubilaires, dont il a été question ci-dessus. Seulement le gouverneur, représentant du pouvoir central, du roi, dans le ressort de la province, et le roi lui-même peuvent, si les événements leur en laissent le temps, intervenir pour annuler le règlement de police du bourgmestre. Mais il convient de remarquer ici que l'intervention de l'autorité supérieure ne peut porter que sur la légalité de l'ordonnance: ce n'est pas cette autorité qui est chargée de la police locale, mais bien les administrations communales. Ce sont donc celles-ci et, le cas échéant, le bourgmestre spécialement, qui sont les seuls juges de l'opportunité des mesures auxquelles il y a lieu de recourir pour maintenir la paix publique. Ainsi le gouvernement ne serait pas en droit d'annuler un règlement de police défendant une procession, un *meeting* en plein air, un cortège socialiste, sous prétexte que le règlement ne se justifierait pas, par le motif que la crainte de troubles n'était pas fondée, était même purement chimérique. C'est à l'autorité communale qu'il appartient de juger souverainement de ce point et de prendre les mesures en conséquence.

En terminant sur cette matière je dois noter que la liberté absolue du droit de réunion (en dehors des rassemblements en plein air) ne fait nullement obstacle à l'exercice du droit de police sur les lieux publics, tels que cafés, marchés, théâtres, et en général toutes les salles publiques. Mais les réunions dans ces lieux ne peuvent jamais être soumises à une autorisation préalable; l'autorité com-

¹ Le bourgmestre doit suivant la même disposition envoyer immédiatement copie de l'ordonnance de police au gouverneur de la province, en y joignant les motifs pour lesquels il a cru devoir se dispenser de recourir au conseil. L'expédition de l'ordonnance peut être suspendue par le gouverneur. Dans ce dernier cas, c'est le roi qui décide en dernier lieu sur la légalité ou la nécessité de l'ordonnance.

munale n'a pas le droit d'interdire un *meeting* dans une salle publique, encore qu'elle eût des raisons d'appréhender que cette réunion serait tumultueuse et entraînerait des désordres dans la rue. De même, ainsi que le dit un des jurisconsultes qui se sont spécialement occupés de cette matière¹, la police pourrait ordonner la fermeture des théâtres, églises, comme des cafés et cabarets à certaines heures, par exemple, de la nuit, mais elle ne pourrait établir pareille règle pour les heures où les citoyens paisibles se rendent d'ordinaire dans ces différents lieux, sans violer la liberté individuelle, la liberté des cultes et le droit de réunion.

Cette matière peut donner bien à des questions délicates, d'une solution parfois malaisée. Mais la rareté des décisions administratives ou judiciaires sur cet objet prouve qu'en Belgique l'usage d'une large liberté n'a point engendré d'abus importants.

IV.

Il nous reste à examiner maintenant quels sont les droits de l'autorité civile dans le cas où les attroupements devenant tumultueux. l'ordre est troublé et qu'il faut le rétablir.

On a vu ci-dessus que le soin du maintien de l'ordre revenait à la police locale: c'est donc aux agents de celle-ci qu'il appartient de prendre les mesures que nécessite le rétablissement de la paix publique.

Mais il peut arriver que la police soit impuissante à réprimer les troubles, à s'apposer aux actes qui menacent la tranquillité publique. Dans ce cas il y a lieu de requérir la force armée représentée en Belgique par la gendarmerie², la garde civique³, et l'armée proprement dite. Le droit de réquisition est conféré par l'art. 105 de la loi communale au bourgmestre, ou à celui qui le remplace, 'dans le cas d'émeutes, d'attroupements hostiles, ou d'atteintes graves portées à la paix publique.'

Le bourgmestre requiert directement sans aucun intermédiaire. La garde civique, comme l'autorité militaire (la gendarmerie comprise), sont *obligées* de se conformer à sa réquisition.

Cet acte du bourgmestre, responsable, comme premier magistrat de la cité, du maintien de l'ordre, n'est soumis à aucune approbation, ni immédiate ni postérieure. Le bourgmestre agit *motu proprio*; il n'a à prendre conseil que de lui-même.

La loi exige que la réquisition ait lieu par écrit pour qu'aucune

¹ Sérésia, Du Droit de Police des Conseils Communaux.

² La gendarmerie est un corps armé spécialement chargé du maintien de l'ordre et de l'exécution de la loi dans toute l'étendue du royaume; elle se trouve sous la direction du pouvoir central.

³ La garde civique n'est pas un corps militaire proprement; c'est la bourgeoisie armée pour le maintien de l'ordre dans la commune.

doute ne puisse exister dans l'esprit de ceux qui sont tenus d'y déférer.

Mais le bourgmestre n'est pas le seul à pouvoir, dans les cas indiqués ci-dessus, requérir le secours de la force armée. Le même privilège est accordé aux gouverneurs et aux commissaires d'arrondissement, représentants du pouvoir central¹. Cependant il est admis que c'est à l'autorité locale qu'il appartient de prendre l'initiative, en vertu même de la mission spéciale de police qui lui incombe, et que le commissaire d'arrondissement d'abord, le gouverneur en suite, ne doivent intervenir qu'en cas d'inaction ou de résistance du bourgmestre (loi du 8 mai 1848).

Il résulte de ce qui précède que l'autorité militaire ne peut intervenir spontanément ; elle ne doit agir que si son aide est réclamée. C'est donc l'autorité civile qui seule apprécie si les rassemblements compromettent l'ordre public, si la police est suffisante pour les dissiper, et si l'emploi de la force armée est nécessaire. L'autorité militaire ne pourrait pas plus prendre l'initiative de l'intervention qu'elle ne pourrait refuser de déférer à la réquisition. Le refus, dans ce dernier cas, rendrait le commandant de gendarmerie, l'officier ou le sous-officier passible d'un emprisonnement de quinze jours à trois mois (art. 259, Code pénal).

Il est admis également que la garde civique ne doit être requise que lorsqu'il a été constaté que la police et la gendarmerie sont impuissantes à rétablir l'ordre, et que ce n'est qu'à la dernière extrémité, quand la garde civique elle-même est débordée, que l'on doit avoir recours à l'intervention de l'armée.

Il est reconnu enfin qu'une fois la réquisition adressée, l'autorité civile n'a plus à s'immiscer dans les opérations militaires. Le nombre des troupes, la choix des armes, leur emplacement et leur mouvement sont abandonnés à l'officier commandant sous sa responsabilité. Les instructions du ministère de la guerre ont toujours été dans ce sens.

Il ne faut pas oublier que l'autorité militaire peut agir directement, sans réquisition, quand elle est elle-même attaquée ; elle se trouve alors dans le cas de légitime défense. De même, dans le cas de flagrant délit elle peut intervenir pour empêcher les pillages ou les violences contre les personnes (art. 106, Code d'instruction criminelle).

V.

Mais la réquisition ne suffit pas pour autoriser de la part des soldats requis l'emploi des armes. Celui-ci doit être précédé d'une

¹ La Belgique est divisée en provinces à la tête desquelles se trouvent des magistrats nommés par le roi et agents du gouvernement. Les provinces se subdivisent en arrondissements administrés par un commissaire.

sommation faite et trois fois répétée par le bourgmestre, l'échevin ou le commissaire de police aux perturbateurs, d'avoir à se séparer et de rentrer dans l'ordre à peine d'y être contraints par la force.

Si la troisième sommation est restée sans résultat, l'autorité civile n'a plus qu'à se retirer et laisser l'autorité militaire maîtresse de rétablir l'ordre par tous les moyens qu'elle a à sa disposition.

L'officier civil qui fait la sommation doit être revêtu de ses insignes afin que nul ne puisse se méprendre sur sa qualité.

Si, après la première ou la seconde sommation, il n'est plus possible de faire l'autre, ou si des actes de violences rendent même la première sommation impossible, il faut employer immédiatement la force (art. 27 du Décret de 1791).

H. LENTZ,

Docteur en droit, directeur général au
ministère de la justice.

III. FRANCE.

LES dispositions du Code pénal et des lois spéciales qui prévoient et répriment les atteintes portées à l'ordre public sont applicables les unes à des actes correctionnels, les autres à des faits d'une moindre gravité.

Le Code pénal punit de la déportation dans une enceinte fortifiée : 1°. l'attentat qui a pour but soit de détruire ou de changer le gouvernement, soit d'exciter les citoyens à s'armer contre l'autorité gouvernementale (art. 87) ; 2°. l'attentat qui a pour but soit d'exciter à la guerre civile en armant ou en portant les citoyens ou habitants à s'armer les uns contre les autres, soit de porter la dévastation, le massacre ou le pillage dans une ou plusieurs communes (art. 91).

La même peine est prononcée contre tout individu qui se met à la tête de bandes armées, ou qui y exerce une fonction ou un commandement quelconque, soit pour envahir des domaines, propriétés ou deniers publics, places, villes, forteresses, postes, magasins, arsenaux, ports, vaisseaux ou bâtiments appartenant à l'état, soit pour piller ou partager des propriétés publiques ou nationales, ou celles d'une généralité de citoyens, soit enfin pour faire attaque ou résistance envers la force publique agissant contre les auteurs de ces crimes (art. 96). Les individus qui ont fait partie d'une bande organisée et armée, sans y exercer aucun commandement ou emploi, et qui ont été saisis sur le lieu de la sédition, sont passibles de la même peine, lorsque cette bande a exécuté ou tenté l'un des attentats ci-dessus mentionnés (art. 97), et, en dehors de ce cas, de la

déportation simple (art. 98). Mais aucune peine ne doit être prononcée pour fait de sédition contre ceux qui ayant fait partie de ces bandes, sans y exercer aucun commandement et sans y remplir aucun emploi ni fonction, se sont retirés au premier avertissement des autorités civiles ou militaires, ou même depuis, lorsqu'ils n'ont été saisis que hors du lieu de la réunion séditeuse, sans opposer de résistance et sans armes (art. 100).

Sous la monarchie constitutionnelle, la Cour des Pairs était appelée à connaître des attentats contre la sûreté de l'Etat prévus par les art. 87 et 91 précités du Code pénal. La haute Cour de Justice pouvait en être saisie, sous la constitution de 1848, par un décret de l'Assemblée Nationale, et, sous la constitution de 1852, par un décret de l'empereur. Les auteurs de crimes de cette nature peuvent aujourd'hui, en vertu de l'art. 9 de la loi constitutionnelle du 24 février 1875, être déferés au Sénat constitué en Cour de Justice.

La loi du 24 mai 1834, rendue à la suite des graves insurrections qui troublèrent le pays dans les premières années du règne de Louis-Philippe, a eu pour objet d'atteindre un certain nombre d'actes qui n'avaient pas paru rentrer exactement dans les prévisions des articles précités du Code pénal. Elle punit de la détention les individus qui, dans un mouvement insurrectionnel, ont porté soit des armes apparentes ou cachées ou des munitions, soit un uniforme, un costume ou d'autres insignes civils ou militaires. Si les individus porteurs d'armes ou de munitions sont en outre revêtus d'un uniforme, d'un costume ou d'autres insignes, ils sont passibles de la déportation, et, s'ils font usage de leurs armes, de la déportation dans une enceinte fortifiée (art. 9). La peine des travaux forcés à temps, à laquelle doit être ajoutée une amende de 200 à 5000 francs, est applicable à ceux qui, dans un mouvement insurrectionnel, se sont emparés d'armes ou de munitions, soit à l'aide de violences ou de menaces, soit par le pillage des boutiques, postes, magasins, arsenaux, etc., soit par le désarmement des agents de la force publique (art. 6). La même peine est encourue par ceux qui, dans un mouvement insurrectionnel, ont envahi, à l'aide de violences ou menaces, une maison habitée ou servant à l'habitation (art. 7). Les art. 8 et 9 prévoient d'autres faits insurrectionnels distincts de la prise d'armes et punissent de la peine de la détention : 1°. L'envahissement ou l'occupation, dans un mouvement insurrectionnel, et pour faire attaque ou résistance à la force publique, d'édifices, postes, ou autres établissements publics ; 2°. l'occupation dans le même but d'une maison privée avec le consentement du propriétaire ou du locataire ; 3°. la construction de barricades, retranchements ou autres travaux ayant pour objet d'entraver l'exercice de la force publique ; 4°. le fait d'empêcher, à l'aide de violences ou de me-

naces, la convocation ou la réunion de la force publique ; 5°. le fait de provoquer ou de faciliter le rassemblement des insurgés, soit par la distribution d'ordres ou de proclamations, soit par le port de drapeaux ou autres signes de ralliement, soit par tout autre moyen d'appel ; 6°. les actes qui tendent à intercepter par un moyen quelconque, avec violences ou menaces, les communications ou la correspondance entre les divers dépositaires de l'autorité publique.

Le législateur ne s'est pas borné à frapper de peines sévères les actes insurrectionnels : il a jugé nécessaire de réprimer par des dispositions spéciales les manifestations tumultueuses qui se produisent sur la voie publique et qui persistent, malgré les injonctions de l'autorité. La première loi portée contre les attroupements a été celle du 21 octobre 1789, célèbre sous le nom de *loi martiale*, et en vertu de laquelle Bailly et Lafayette ont fait disperser par la force, en 1791, les rassemblements séditieux du Champ de Mars. Aux termes de cette loi, lorsque la tranquillité publique était en péril, les officiers municipaux étaient tenus de déclarer que la force militaire devait être employée pour rétablir l'ordre ; cette déclaration se faisait en arborant à la maison de ville et en promenant dans les rues le drapeau rouge ; à ce signal tous les attroupements, avec ou sans armes, devenaient criminels et devaient être dissipés par la force. Les prescriptions rigoureuses de cette loi ont été restreintes dans leur application par le décret du 26 juillet 1791. Ce dernier décret a lui-même été successivement modifié et complété par la loi du 10 avril 1831 et par celle du 7 juin 1848, qui n'a pas cessé d'être en vigueur. L'article 1^{er} de cette dernière loi interdit d'une manière absolue tout attroupement armé sur la voie publique ; il interdit également les attroupements non armés dans le cas où ils peuvent troubler la tranquillité publique. Pour qu'un rassemblement soit considéré comme illicite, il faut, d'après le décret de 1791, qu'il soit composé de plus de quinze personnes. Lorsqu'un attroupement armé ou non armé se forme sur la voie publique, le maire ou, à son défaut, tout autre agent ou dépositaire de la force publique revêtu de l'écharpe tricolore, se rend sur le lieu de l'attroupement. Si cet attroupement est armé, il lui fait sommation de se dissoudre ; si cette première sommation reste sans effet, une deuxième sommation, précédée d'un roulement de tambour, est faite par le magistrat, et, en cas de résistance, l'attroupement est dissipé par la force. Si l'attroupement est sans armes, le magistrat, après le premier roulement de tambour, exhorte les citoyens à se retirer. S'ils n'obtempèrent pas à cette injonction, trois sommations sont successivement faites, et, en cas de résistance, l'attroupement est dissipé par la force (loi du 7 juin 1848, art. 4). L'individu porteur d'armes faisant partie d'un rassemblement armé

qui s'est dissipé après la première sommation, et sans avoir fait usage de ses armes, est puni d'un emprisonnement d'un mois à un an. La peine est portée d'un à trois ans d'emprisonnement si l'attroupement s'est formé pendant la nuit. Si l'attroupement ne s'est dissipé qu'après la deuxième sommation, mais avant l'emploi de la force, et sans qu'il ait fait usage de ses armes, la peine est d'un à trois ans d'emprisonnement; cet emprisonnement est de deux à cinq ans si l'attroupement s'est formé pendant la nuit. La peine est de cinq à dix ans de détention lorsque l'attroupement ne s'est dissipé que devant la force, et de cinq à dix ans de réclusion lorsque l'attroupement ne s'est dissipé qu'après avoir fait usage de ses armes. La peine de la réclusion est également applicable, lorsque l'attroupement a lieu la nuit, s'il ne s'est dissipé que devant la force ou après avoir fait usage de ses armes (art. 4). Quiconque faisant partie d'un attroupement non armé ne l'a pas abandonné après le roulement de tambour précédant la deuxième sommation, encourt un emprisonnement de quinze jours à six mois. La peine est de six mois à deux ans d'emprisonnement lorsque l'attroupement n'a été dissipé que par la force (art. 5).

La loi du 30 juin 1881 sur la liberté de réunion a laissé subsister toute entière la loi du 7 juin 1848. Elle interdit les réunions sur la voie publique (art. 6), et il a été reconnu dans la discussion que les réunions accidentelles qui se formeraient sur la voie publique, en dehors de toute formalité, demeureraient soumises aux dispositions de la loi sur les attroupements. Mais il a été également reconnu que l'autorité municipale pouvait accorder l'autorisation de tenir une réunion sur la voie publique.

Le principe de la responsabilité des communes en cas de crimes ou délits commis à force ouverte et par attroupements sur leur territoire a été consacré par la loi du 10 Vendémiaire, an IV. Cette loi d'une rigueur draconienne a été rendue quelques jours avant la journée du 13 Vendémiaire, dans laquelle l'artillerie de la Convention mitrilla sur les escaliers de l'Eglise St. Roch les sections parisiennes insurgées, et où commença la fortune politique du général Bonaparte. Elle déclarait tous les habitants de la commune civilement garants des crimes et délits; elle leur imposait à titre de réparation la restitution des choses pillées ou détruites ou le paiement du double de la valeur de ces objets et en outre des dommages—intérêts qui ne pouvaient être inférieurs à cette valeur et une amende égale au profit du Trésor. La loi municipale du 5 avril 1884 (art. 106 et suivants) a maintenu le principe de la loi de Vendémiaire, mais elle en a atténué les dispositions les plus rigoureuses. A la responsabilité des habitants elle a substitué celle de la commune, sauf répartition ultérieure du montant des condamnations

entre les habitants. Pour que la commune soit responsable, il faut : 1°. qu'il y ait préjudice causé soit aux personnes soit aux propriétés publiques ou privées ; 2°. que ce dommage ait été causé par des attroupements ; 3°. que le délit ait été commis à force ouverte ou par violence. La loi municipale supprime l'amende qui devait être infligée au profit de l'Etat, et laisse aux tribunaux le soin d'arbitrer les dommages—intérêts conformément au droit commun. La commune doit être déchargée de toute responsabilité, 1°. lorsqu'elle peut prouver que toutes les mesures qui étaient en son pouvoir ont été prises à l'effet de prévenir les attroupements et d'en faire connaître les auteurs ; 2°. lorsque les dommages causés sont le résultat d'un fait de guerre ; 3°. dans les communes où la municipalité n'a pas la disposition de la police locale ni de la force armée. Cette dernière exception comprend la ville de Paris, celle de Lyon et les villes qui sont placées sous le régime de l'état de siège.

ALBERT GIGOT,
Ancien Préfet de Police.

[It will be observed that the special enactments referred to were all passed by constitutional, and the most important of them by republican legislatures.—EDITOR.]

IV. SWITZERLAND.

THE right of public meeting [so far as implied in that of forming lawful associations] is guaranteed by the federal constitutions of 1848 and 1874 (art. 56). The former constitutions of 1815 contained no such guarantee, nor that of 1803 called Mediation, or the Helvetic constitution of 1798. This right of public meeting is guaranteed to Swiss citizens only, and to foreigners belonging to states which have concluded treaties of reciprocal rights of settlement, who are accordingly admitted to reside in any of the Swiss cantons on the same footing, and on the same conditions as citizens of the other Swiss cantons. British subjects are therefore entitled to have public meetings and to form associations if they are resident in Switzerland, but foreigners domiciled abroad have not the right to hold public meetings in Switzerland. The government of Zürich was therefore within its right in forbidding an international congress of Socialists.

The right of public meeting is however not so absolutely guaranteed by the federal constitution as other individual rights are ; for instance, the freedom of the press¹, but dependent on political reasons, and the scope and means of the meetings. The execution of Article 56 of the federal constitution is reserved to the cantons, but the federal tribunal can, when the case arises, decide on appeal whether the principle of the constitution is violated or not. Suppose the cantonal government interdicts a meeting for its dangerous character, then the federal tribunal has on appeal to examine the merits of the case, and to decide accordingly. In the case of the international meeting of Socialists at Zürich, the tribunal confirmed the prohibition issued by the government of Zürich. On the whole, the governments are very liberal, and the cases of interdiction very scarce, but the right of interdiction of meetings having a dangerous or seditious character cannot be contested, and is used if necessary.

Resistance to public officers is not dealt with by the federal constitution, but is left to the cantonal legislation or cantonal constitutions. The constitution of the canton of Bern justifies resistance against the unlawful entering of a house by an official or a policeman. Complaints of this kind are very rare in Switzerland. On the other hand, the public assembling of people with the intention of resisting public authorities by force, or of forcing them to revoke any measure, or of taking revenge on public authorities for measures executed by them, is treated as riot by the federal penal code. If the riot ceases after the formal summons which answers to the so-called reading of the Riot Act in England, the instigators are nevertheless punishable with two years' imprisonment with hard labour ; and if the authorities are obliged to restore order by force, then the participants are punishable with from two years' imprisonment with hard labour to ten years' penal servitude, if loss of life or injury to person or property has taken place. In case of less serious harm having been done the penalties are milder (Code Pénal of 1853, art. 46). The cantonal penal codes deal in the same way and almost in the same words with resistance to any public authority in the exercise of its duties or functions, and violence offered to public officers.

On the whole, resistance to public authority and public officers is subjected to various penalties by both federal and cantonal laws. Although executive government is not so strong in Switzerland as in the monarchical states of the Continent, resistance to the

¹ 'Die Pressfreiheit ist gewährleistet,' art. 55. The language of art. 56 is 'Die Bürger haben das Recht, Vereine zu bilden, sofern,' &c.

execution of the law, and to public officers in the exercise of their office, is not favoured by public opinion, and is not of common occurrence.

K. G. KÖNIG.

[We are compelled by want of space to omit the extracts from cantonal constitutions—those of Ticino, Luzern, Solothurn, Bern, Aargau, and Zürich—which were added in Dr. König's MS.]

We have received, just before going to press, an article on the law of the United States—in other words, the received American interpretation and application of the Common Law—by Mr. Edmund H. Bennett, Dean of the Law School of Boston University. This will appear in our July number. Meanwhile we extract a few sentences. 'A public meeting becomes unlawful so soon as from general appearances and all the surrounding circumstances it naturally excites terror, alarm, and consternation in the minds of peaceable and law-abiding citizens; so soon as in the minds of rational and firm-minded men it is likely to endanger the peace and tranquillity of the neighbourhood. . . . When that condition of things exists, that moment the peace officer may intervene and disperse the assembly. Whether that state of things does or does not exist must be finally passed upon by a jury of the country in prosecutions arising out of such interference. No abstract rule can be laid down beforehand, but it is safe to say that in America the inclination of juries as a rule is to support law and order, and to protect the officer in the *bona fide* discharge of his apparent duty on such critical occasions.'—EDITOR.

CURIOSITIES OF COPYRIGHT LAW.

DEFORMITY, if sufficiently choice, is to the Oriental eye as admirable as beauty and symmetry. The Western mind, while waiting patiently for a finer model, may perhaps occupy itself in that admiration which is not approval,—admiration of some features of the Law of Copyright—Literary, Dramatic, Artistic, and Musical.

It should be premised that in this article the term Copyright means only those rights which are the creation of Statute, as opposed to those which exist at Common Law. No fewer than fifteen statutes have dealt with the topic, many of them remarkable for the variety of their effects and for the difficulty and impurity of their style.

A Royal Commission which reported in 1878 on the whole subject did justice to the bad grammar, to be found in 5 & 6 Vic. c. 45, § 18,—to the first section of 54 G. iii. c. 56, which is styled 'a miracle of intricacy and verbosity,' in which an 'of' appears which 'may be a misprint,' and the first half of the section is repeated in the second half with every circumstance of difficulty,—and to the carefulness with which the Statute 17 G. iii. c. 57, one sentence of fifty-five lines, was passed to qualify a sentence of sixty-one lines, i. e. 8 G. ii. c. 13, § 1 in two small particulars.

The Commission reported recommending Codification, with certain amendments in the substantive law. As a result one small amending Statute was passed four years afterwards (45 & 46 Vic. c. 40). The only thing that detracted from its efficiency was that by ill luck no sanction had been provided for disobedience.

At Common Law a man has before 'publication' a right of property in his own productions, literary or artistic, in virtue of which he can restrain any person from copying them (*Prince Albert v. Strange*, 1 Mac. & Gor. 25; *Duke of Queensberry v. Shebbeare*, 2 Eden 329). What constitutes 'publication' is hard to say, and probably each class of case should be judged on its own merits, but it seems that for publication in the vulgar sense to be publication in the legal sense it must not be clogged with conditions or trusts, express or implied (*Mayall v. Higbey*, 1 H. & C. 48; *Abernethy v. Hutchinson*, 1 Hall & Twell. 28; *Caird v. Sime*, 12 Ap. Ca. 326).

The effect of 'publication' on the Common Law right of property has been the occasion of learned difference (*Millar v. Taylor*, 4 Burr. 2303; *Donaldson v. Beckett*, 4 Burr. 2408; *Jeffreys v. Boosey*, 4 H. L. C. 815). But the victorious opinion seems to be that after

publication the only rights existing are those conferred by Statute, that is to say, Copyright, the exclusive right to multiply copies.

The present state of the Law of Copyright seems to be this. The term of copyright in Books and in printed and published Dramatic Pieces and Music under 5 & 6 Vic. c. 45, § 3 is the life of the author and seven years after his death, or forty-two years from the date of publication, whichever is the longer.

The term of copyright in Music not printed and published, but publicly performed, is (under the provisions of 3 Will. IV. c. 15, § 1, and 5 & 6 Vic. c. 45, § 20), according to the report of the Royal Commission, doubtful, and may be perhaps perpetual, while that in Lectures not printed and published, but publicly delivered, is wholly uncertain; but in Lectures printed and published it is the life of the author, or twenty-eight years from publication, whichever is the longer (5 & 6 Will. IV. c. 65).

The term for Engravings, Etchings, and Prints is twenty-eight years from publication (under 8 G. ii. c. 13; 7 G. iii. c. 38; 17 G. iii. c. 57; 6 & 7 Will. IV. c. 59; 15 & 16 Vic. c. 12, § 14); for Sculptures, fourteen years from putting forth or publishing, and another term of fourteen years if the author is alive at the end of the first term (54 G. iii. c. 56).

Paintings, Drawings, and Photographs come under the provisions of 25 & 26 Vic. c. 68, which gives the author of every original painting, drawing, and photograph copyright for his life and seven years afterwards. No mention, it will be noticed, is made of publication or putting forth as the period from which copyright is to run. To this point further reference will be made.

For establishing the fact of ownership or the date of publication, Registration provides the means, simple, cheap, and efficacious. And the Register at Stationers' Hall is no new invention, nor is it unknown to the Statutes on Copyright. But there are these differences to be noticed. To enable a person to sue for infringements of his Dramatic Copyright or Copyright in Lectures or Engravings, no Registration is needed. To enable a person to sue for infringements of his Copyright in Books and Paintings, Registration is needed, with this further distinction; that after Registration the owner of copyright in a book may, but the owner of copyright in a painting may not, sue for infringements committed before Registration (5 & 6 Vic. c. 45, §§ 13, 24, for Books; 25 & 26 Vic. c. 68, § 4, for Paintings).

To show the difficulty which seems to attend the interpretation of these Statutes, Vice-Chancellor Malins, in the case of *Cox v. Land and Water Journal*, L. R. 9 Eq. 324, decided that a newspaper was neither a 'periodical work' nor a 'sheet of letterpress' within

the meaning of 5 & 6 Vic. c. 45, §§ 18, 2, and so did not require registration, but that there was some sort of copyright after publication; a doctrine not easy to reconcile with that of *Jeffreys v. Boosey*. The late Master of the Rolls declined to follow that decision in *Walter v. Howe*, 18 Ch. D. 709. Two judgments are thus in direct conflict, although possibly small doubt will exist as to which is the correct view.

A question of some nicety of principle is, at what point an author's rights in his work should cease to receive legal protection. Is an author fairly entitled to all the advantages, direct and indirect, which can be extracted from his work? It is generally agreed that it is for the public interest that a man should be entitled to get the full market value of the immediate and sole productions of his unaided hand and brain; and that he should be able to call on the law to protect him in this right. But do his rights go further, and if so, how much further? What amount of added labour or independent research will justify *B* in using the result of *A*'s labour, and making profit out of them? And this is the question of Abridgments and Adaptations, while the principle involved goes to the root of Artistic Copyright. Now, without discussing what is the correct view to take, it seems difficult to see why, allowing for differences in material, a man may dramatise my novel, but may not make a steel engraving of my picture. Neither my novel nor my picture will sell the worse; if anything my novel might. Again, judging from the standpoint of added labour and skill one might say that to produce a fine steel plate was more meritorious and difficult, required rarer faculties, though less remunerative, than to adapt somebody's novel for the boards. The English law allows the latter, but not the former.

Nor is the law of adaptation free from difficulty. In books there is one sort of copyright, in dramatic productions—as in music too—there are two, the literary right as in books, and the performing right. There is apparently no protection for dramatic performances apart from Statute. 'The author of a drama is not protected by the common law' (per Cockburn, C. J., *Toole v. Young*, L. R. 9 Q. B. 527). But when he has written his play and has not printed and published it, he has, it is supposed, the common law rights of property in the literary work, which are not divested by the representation of the play. And the converse of this is true, *Chappell v. Boosey*, 21 Ch. D. 232. The two rights are distinct. In the case of *Macklin v. Richardson*, Amb. 694, the defendant employed shorthand writers to take down the play from the actors' mouths and published it, and it was held that he could not do so. If instead of publishing the dialogue he had thrown it in the form of a novel, it is sug-

gested that he would have been equally wrong, on the analogy of the case where *A* printed a drama which he had made out of *B*'s novel by throwing the novel into dialogue (*Tinsley v. Lacy*, 1 H. & M. 747). If this view is correct, *A* may be restrained from novelising *B*'s play, but *B* may dramatise *A*'s novel (*Read v. Conquest*, 9 C. B. N. S. 755). Add to this that the doctrine that 'a fair abridgment is no piracy' has not been unknown to the law (*Bell v. Walker*, 1 Bro. C. C. 451; *Dodsley v. Kinnersley*, Amb. 403; *Gyles v. Wilcox and Others*, 2 Atk. 141), though this doctrine has undergone considerable limitations of recent years.

The Statute 5 & 6 Vic. c. 45 by § 20 creates a right in the sole liberty of representing or performing any musical composition, and § 21 enacts that the person who has the sole liberty of representing a dramatic piece or musical composition shall have the remedies given by 3 & 4 Will. IV. c. 15, 'as fully as if the same were re-enacted in this Act.' In an action by the owner of the sole liberty of performing a musical composition which was not a dramatic piece to recover penalties for the unauthorised performance of that composition at a place which was *not* a place of dramatic entertainment, it was held that the plaintiff was entitled to recover the penalty of 40s. given by 3 & 4 Will. IV. c. 15, § 2 (*Wall v. Taylor*, *Wall v. Martin*, 9 Q. B. D. 727: 11 Q. B. D. 102). It was before the Royal Commission that many persons had innocently purchased songs at shops, and had sung them at concerts, and were immediately requested to pay 40s. to Mr. Wall, who had become assignee of the sole liberty; and the Report recommended that it should be a condition precedent to action that this sole liberty should be brought to the notice of the intending purchaser by an intimation printed on each copy that the right of public performance was reserved. In an Act 45 & 46 Vic. c. 40, which recited that it was expedient to protect the public from vexatious prosecutions for the recovery of penalties under such circumstances, it was enacted that any person who was desirous of retaining in his own hands exclusively the right of public representation or performance of a musical composition should print the notice recommended by the Royal Commission. But unluckily, as has been said before, nothing was said as to such notice being a condition precedent to action, no sanction was provided for disobedience.

Under the heading of Artistic Copyright comes Copyright in Engravings, Sculptures, Paintings, Drawings, and Photographs.

Works of Art fairly divide themselves into two classes: the first, in which unlimited mechanical reproduction is possible; the second, where it is not; reproduction meaning here such that the copy would be mistaken for the original. The first class would include

engravings by different processes and photographs; the second paintings by Millais, drawings by Flaxman, and perhaps busts by Chantrey.

Now, while unauthorised reproductions of a celebrated photograph or engraving might from their fraudulent faithfulness injure the sale of the thing imitated, an unauthorised imitation of 'Cherry Ripe' would, if it did anything, only serve to advertise the picture and enhance its value. A great picture has no resembling twin.

It is not proposed to examine here whether there should be any copyright at all in works of art, or, if there should be, whether it should be the same for all species of artistic work; but if a difference is made, and if the foregoing division is sound, one would expect to see that engravings got the same treatment as photographs, and paintings the same as drawings, and perhaps as sculptures.

This is, however, not so; and some general observations have already been made on this point. The last Statute, 25 & 26 Vic. c. 68, deals indiscriminately with paintings, drawings, and photographs, invents a new term of copyright for all three, viz. life and seven years after, and, instead of keeping to the old 'publication,' makes copyright run apparently from the making of the artistic work. So that for a sculptor copyright runs from 'first putting forth or publishing'; for the painter and draughtsman from making; for the engraver from 'first publication'; for the photographer from making, while the confusion is heightened by the fact that while Millais is the author of his picture, and a person who pays another to compile a book of designs for him is entitled to the copyright (*Grace v. Newman*, 19 Eq. 623); yet the 'author' of a photograph is the paid assistant who arranges the posture, and takes the cap off the camera (*Nottage v. Jackson*, 11 Q. B. D. 627). The result is, that engravings differ from photographs, sculptures, drawings, and paintings, while paintings, drawings, and photographs, which need have nothing in common, have this in common, that they have nothing in common with anything else.

One must not omit to notice a peculiarity in the Statute 25 & 26 Vic. c. 68. Copyright in this article has been 'the creature of statute' to supply the wants of those common law rights which are divested by 'publication.' The Statute recites, 'by law as now established the authors of paintings, drawings, and photographs have no copyright in such their works.' This, if it means statutory copyright which comes after publication, is quite true. It then proceeds to give the sole and exclusive right of copying, etc. to the author and his assigns for life and seven years after, irre-

spective of publication ; that is, before publication, and while his common law rights are in full force. This is a new meaning of copyright. But this is only a matter of terminology. It is more important to notice that this provision may leave the persons intended to be protected in a worse position than other artists. If *A* makes a drawing, keeps it in his drawer locked up, publishes it one year before his death, his common law rights, which have been existing side by side with his statute rights, both perfectly useless, have gone, and his copyright runs only eight years. Perhaps, however, a few more statutes will make the law better.

The Commission reported in favour of Codification, and my friend, Mr. T. E. Scrutton, a master of the subject, tells me that two bills are drafted, ready to be passed. But Codification is a homely subject, and lacks perhaps parliamentary interest. Neither party advocates it, for neither party opposes it. Practical men agree, so nothing is done. It is late to sing its praises, and the public is deaf, *et sero et surdo canimus*. The topic was sometime no stranger to the schools, we are silent *ne declamatio fiat*. But whether Codification is good because it tends to make the law intelligible, or because it tends to make it intelligent, Copyright Law needs it.

A. T. CARTER.

A DISPUTED POINT IN THE LEX AQUILIA.

(Fr. 11, § 3 *Ad Leg. Aq.* compared with fr. 51 pr. h. t.)

AN exegetical parallel between fr. 11, § 3 *Ad Leg. Aq.* (IX. 2) and fr. 51 pr. h. t. gives rise to one of the most interesting and elegant questions in Roman Law differently dealt with by different writers, and recently resolved in a quite new manner by Professor Ferrini¹.

Fr. 11, § 3 is as follows:—

'Celsus scribit, si alius mortifero vulnere percusserit, alius postea exanimaverit, priorem quidem non teneri quasi occiderit, sed quasi vulneraverit, quia ex alio vulnere periit, posteriorem teneri, quia occidit. quod et Marcello videtur et est probabilius.'

Fr. 51 pr. h. t. runs thus:—

Julianus libro LXXXVI digestorum. *'Ita vulneratus est servus, ut eo ictu certum esset moriturum: medio deinde tempore heres institutus est et postea ab alio ictus decessit: quaero an cum utroque de occiso lege Aquilia agi possit. respondit: occidisse dicitur vulgo quidem qui mortis causam quolibet modo praeiuit: sed lege Aquilia is demum teneri visus est qui adhibita vi et quasi manu causam mortis praeiuisset, tracta videlicet interpretatione vocis a caedendo et a caede. rursus Aquilia lege teneri existimati sunt non solum qui ita vulnerassent, ut confestim vita privarent, sed etiam hi quorum ex vulnere certum esset aliquem vita excessurum. igitur si quis servo mortiferum vulnus infligerit, eundemque alius ex intervallo ita percusserit ut maturius interficeretur quam ex priore vulnere moriturus fuerat, statuendum est utrumque eorum lege Aquilia teneri.'*

Thus, according to Celsus' opinion, referred to and accepted by Ulpian in his eighteenth book *ad Edictum*, and agreed with by Marcellus, if a slave had received a deadly wound from one person and had been afterwards killed by another, the former ought to be liable only *de vulnerato*, i. e. under the third chapter of the law, the latter *de occiso*, i. e. under the first chapter of it².

Julianus' opinion stated in fr. 51 pr. h. t. is in full opposition to Celsus'. He said that in the same case supposed by Ulpian both

¹ Rendiconti dell' Istituto Lombardo, Serie II, vol. xix, fasc. v-vi. Postille esegetiche a frammenti del commentario di Ulpiano alle formule edittali ad legem Aquilianam.

² We transcribe here the text of the Aquilian Law as given by Grueber in his valuable work:—*The Roman Law of Damage to Property*. Oxford. 1886. pp. 199.

Chapter I. *Si quis serrum serramve alienum alienamve quadrupedemve pecudem iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum aes ero dare damnas esto.*

Chapter III. *Ceterarum rerum praeter hominem et pecudem occisos, si quis alteri damnum faxit, quod uaserit fregerit ruperit iniuria, quanti ea res fuerit in diebus triginta proximis, tantum aes domino dare damnas esto.*

[It is uncertain whether the words 'praeter . . . occisos' are part of the ancient text or a gloss of Ulpian or some former text-writer: but this makes no substantial difference.]

wounders, the former as well as the latter, ought to be liable *de occiso*.

Such a contrast of opinions, in a book of law intended for practical purposes as the Digest is, has naturally fatigued the *Interpretes*, who being, the major part of them, inclined to consider Justinian's work as throughout consistent, attempted a dogmatical conciliation of the two contradicting fragments. Mr. Grueber, who is the most recent writer on this matter, thus explains his opinion:—

'The facts of the case are apparently the following: *A* wounds the slave of another person mortally, but before the slave dies *B* comes and kills him, e.g. by cutting off his head. It naturally follows that *B* is liable under the first chapter, whereas *A* is liable only under the third chapter for wounding the slave; for though from the nature of the wound death must necessarily have resulted, yet in this case the death of the slave was caused by the subsequent act of decapitation. This view which, as we learn from the passage, is concurred in by Celsus, Marcellus and Ulpian, underlies also the decision in 15, § 1, h. t., where Ulpian, in harmony with Julian, states that a person who had mortally wounded a slave, who was afterwards killed by the fall of a house or by shipwreck, will be liable under the third and not the first chapter of the *lex*. There is, however, another passage of Julian, 51 pr., which at first sight seems to express a different view, and which has induced several writers to assert that it contradicts the fragment we are considering. There also a case is supposed, in which a slave who was mortally wounded by one person was afterwards wounded by another in consequence; but here both the persons are declared to be liable under the first chapter. A careful examination of this passage, however, shows that it was only caused in concurrence with the wound already inflicted on the slave, that his death followed earlier ("*ut maturius interficeretur*") than was expected from the first wound. Accordingly both the wounds were necessary to effect the death just at the time when it happened, and therefore both the delinquents are liable for having killed the slave¹.'

In this point of his work the learned author accepts Vangerow's opinion without taking into account the difficulties to which it is exposed. He exaggerates the importance of the moment in which the death of the slave takes place. According to him, in fr. 11, § 3, the second blow kills instantly—like a decapitation—and so breaks the causal connection between the first blow and the death; in fr. 51 pr., on the contrary, it does not kill instantly, but simply causes the slave's death to take place sooner than it would have done if there had been no second blow. The distinction, however, can be maintained neither logically nor with reference to the text. The texts do not make such distinctions as Mr. Grueber says between

¹ op. cit. p. 36.

the second wound spoken of in fr. 11, § 3, and that in fr. 51 pr., and even if we could grant some importance to the two different expressions—*postea exanimaverit* and *maturius interficeretur*, the causal connection would be broken in fr. 51 pr. as well as in fr. 11, § 3. But what is more important, Mr. Grueber overlooks another fragment of the Digest which clearly shows that in the case considered by Julianus in fr. 51 pr. the second blow was immediately followed by death. I mean fr. 51, § 2, that runs as follows:—

'Aestimatio autem perempti non eadem in utriusque persona fiet: nam qui prior vulneravit tantum praestabit quanto in anno proximo homo plurimi fuerit repetitis ex die vulneris trecentum sexaginta quinque diebus, posterior in id tenebitur quanti homo plurimi venire poterit in anno proximo quo vita excessit, in quo pretium quoque hereditatis erit.'

If Julianus said that the second wounder in fr. 51 pr. *tenebitur quanto in anno proximo homo plurimi fuerit*, this is the most clear proof that the second blow, in the case under consideration, had precisely the effects which Vangerow and Grueber would assign only to that spoken of in fr. 11, § 3, for as it appears from fr. 21, § 1, it was Julian's opinion that 'the year to be taken into account when assessing the highest value of the slave was to be reckoned backwards from the moment the deadly wound had been inflicted.' Grueber's opinion cannot consequently be accepted.

Professor Ferrini rejecting all theories propounded till nowadays has attempted a new explanation of the two fragments. The case made by Julianus in fr. 51 pr. must in his opinion be considered under a different point of view from that considered in fr. 11, § 3. 'Julianus thought,' says he¹, 'that in the case of a slave wounded with such a wound as generally produces death and who is afterwards killed by another person, it is always doubtful to whom the death can be ascribed. The first blow might, owing to the strong constitution of the slave or to other favourable circumstances, have been cured; the second would not have produced the death of the slave if he had not already been infirm, owing to the preceding blow.'

Fr. 51, § 1 affords, at first sight, a solid argument in favour of this opinion:—

'Idque est consequens auctoritati veterum, qui cum a pluribus idem servus ita vulneratus esset ut non pareret cuius ictu perisset, omnes lege Aquilia teneri iudicaverunt.'

Nevertheless on thorough consideration the new opinion cannot be maintained. First of all, are we sure that § 1 occupied in Julian's

¹ op. cit. p. 251

libri digestorum the same position it has in the *Corpus Juris*? It might be otherwise, but Professor Ferrini assumes it as sure. He begins stating that a wound *qua certum esset aliquem vita excessurum* is a wound capable generally of causing a slave to die. That is going a little too far. Why should the jurist speak of a wound as certain to have a fatal result, if he meant only a wound not necessarily mortal, but capable of causing death? True it is that practically it is very difficult to determine the absolute fatality of a wound, but it is also true that every reasoning requires a fact, real or supposed, to start from. On the other hand, it very often occurs that a juridical theory breaks down under the difficulties of practical applications, as law is rigid and formulated whilst life is varied and changeable. Let us accept for an instant Ferrini's opinion, then how could we explain fr. 11, § 2?—

'Sed si plures servum percusserint, utrum omnes quasi occiderint teneantur, videamus. et si quidem apparet cuius ictu perierit, ille quasi occiderit tenetur: quod si non apparet, omnes quasi occiderint teneri Iulianus ait, et si cum uno agitur, caeteri non liberantur: nam ex lege Aquilia quod alius praestitit alium non relevat, cum sit poena.'

It is here stated by Ulpian in what case Julianus thought that the principles of complicity came in and how they did. May we say that in fr. 51 pr. *non apparet cuius ictu servus perierit*? On the contrary the jurist starts from the supposition that the slave was definitively killed by the second blow. Let us even suppose that this fragment does not exist, what is to be understood by Ferrini's complicity: a subjective one, a conspiracy among the wounders? Such complicity is quite disregarded in suing under the Aquilian Statute. If he intends an objective complicity, then it is excluded by the supposition made by the jurist that the first blow is deadly.

We cannot then accept even Ferrini's theory, and the contradiction of the two fragments remains. Resort to such ingenuous explanations as that given by the Glossa¹ is not allowed nowadays. If, according to it, we said that fr. 11, § 3 did not consider the case of a first deadly wound, the application of the law would be by far easier, but the scientific study of it would not gain anything by doing so.

We believe that one must never forget that the *Corpus Juris* is a mosaic made out of fragments of numerous works belonging to different ages and very different men, and that it was composed in a very short time, so that even to professors and lawyers greater than those to whom the work was intrusted, it would have been impossible to avoid little theoretical discordances. The contrast of opinions

¹ The opinion of the Glossa is agreed upon by the latest Byzantini: s. Ferrini, op. cit. 247.

arising by the comparison of the two fragments before us is one of them.

But such a historical solution as already hinted by Pernice¹ seems at first sight to contradict the opinion expressed by the same Julianus in fr. 15, § 1:—

‘Si servus vulneratus mortifere postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non posse, sed quasi de vulnerato, sed si manumissus vel alienatus ex vulnere perit, quasi de occiso agi posse Julianus ait.’

Glück² has supposed that Julian changed his opinion, but this cannot be admitted, for, as Professor Ferrini justly observes, ‘the latest critical studies on the use of the *fontes* in Paulus’ *Commentarii* render it impossible: Ulpianus in writing fr. 15, § 1, as well as fr. 11, had before himself the same eighty-sixth of Julian’s *Digesta*.’ The real truth is that the case put in fr. 51, § 2 is quite different from that contemplated in fr. 15, § 1; the former of them supposes that a slave mortally wounded comes by his death owing to a second blow inflicted upon him by another; in the case of the latter we have a wound which would have caused death, but before this took place an unforeseen misfortune (*ruina vel naufragium*) puts an end to the wounded slave’s existence. It suffices to remember the Roman ideas on fate and fortune to understand that the two cases would present themselves with quite different features to the Roman jurist. Contemplating the case considered in fr. 15, § 1, Julian maintained that the action ought to be *ex vulnerato*, for the *ruina* and *naufragium* were to him as something unavoidable, breaking the causal connection between the wound and the death. This having not taken place before the *ruina* is considered as if it never could have happened, and consequently the wounder cannot be held responsible on the ground that the death would have happened necessarily. Fr. 15, § 1 is then by no means in contradiction with fr. 51 pr.

It suits our purpose here to go back to the general principles regarding the *actiones legis Aquiliae*. Among the requirements for bringing an Aquilian action, one has a special interest in our case, namely the necessity on the part of the plaintiff to prove that the slave had been killed; in all cases considered by the first chapter of the *lex*, the plaintiff was obliged to prove that the slave had been killed; in all cases considered by the third chapter of it, that he

¹ Dr. Alfred Pernice, *Zur Lehre von den Sachbeschädigungen, nach Römischen Rechte*, Weimar, 1867, p. 181. Sonach lässt sich Julians Ansicht gerade bei Verwundungen eine Ausnahme von der sonstigen Regel zu machen, wol erklären. That Julianus started from the supposition that the first blow was deadly is also shown by Schol. 7, Bas. 7, 60 (5, 319): τούτό ἐστιν ἡ διαφορὰ τοῦ παρόντος κεφαλαίου πρὸς β' θέμα τοῦ ιε' κεφαλαίου, ὅτι ἐκεῖ ἡ πρώτη πληγὴ οὐκ ἦν ἐξ ἀνάγκης θανάσιμος, ἀλλ' ἀμφίβολος, ἐνταῦθα δὲ ἡ πρώτη ἐξ ἀνάγκης ἐμέλλε φονεῦσαι τὸν πληγέντα, καὶ ἴσως μεθ' ἡμέραν.

² Ausführl. Erläut. x. 347.

³ Ferrini, op. cit. p. 250.

had been wounded. Let us examine now which actions might be brought by the owner of the dead slave in fr. 11, § 3.

According to the *communis opinio* the answer is very easy. He might have brought two actions, one against the wounder *de vulnerato* as soon as the slave had been wounded, a second one against the killer after the slave's death. This view is, as the prevalent one, accepted by Celsus, Marcellus and Ulpian. Julianus is the only jurist who did not accept it. He wanted to be a reformer in this point as he had been in many others. As we have already noticed he had maintained, against Celsus, that the period of time within which assessment of damage had to be made should be reckoned back from the moment of the blow; he went even further and assumed that the slave who had received a blow *qua certum esset perituum* might be considered as dead by the owner, who was so entitled to bring an action *de occiso* whilst the slave was still alive. In other words, Julianus, as well as all other jurists, admitted in general the possibility of a deadly wound, and simply differed from them inasmuch as he assumed it as a sufficient condition for bringing an *actio de occiso*. Ulpian's words in fr. 15, § 1:—

'Haec ita tam varie quia verum est eum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit; at in superiore non est passa ruina apparere an sit occisus.'

comment on Julian's opinion with reference to the common opinion, and not according to the special view propounded by the compiler of the *Edictum Perpetuum*, which was rejected by Ulpian, Celsus and Marcellus (fr. 11, § 3, h. t.).

The attempt made by Julianus was certainly exposed to practical difficulties, though a very liberal one, but this does not make against our theory; on the contrary it confirms it, as we are told that the most part of jurists did not agree with Julianus. Besides it must not be overlooked that Julian's opinion was addressed to a very limited number of cases, for if the first wound was slight the question could not arise, if it had been deadly it would very seldom have been followed by another. But the most forcible arguments are textual; we cannot expose them more clearly than by translating Ferrini's account of them¹.

'Undoubtedly,' he says, 'Pernice's opinion may be supported by many exegetical arguments. The opinion manifested by Ulpian in fr. 11, § 3, belongs, as he expressly avows, to Celsus, from whom Marcellus borrowed it. Now it is known that Celsus very often entertained opinions opposite to those supported by Julianus, and that even in this matter the two great contemporaries were at variance (fr. 21, § 1, h. t.; D. IX, 4, 2, 1). Marcellus criticises

¹ op. cit. p. 249.

Julianus' opinions, and not only in his Notes to him, and tries to limit their efficacy (see e. g. fr. 27, § 3, h. t.). In composing fr. 11 Ulpianus had under his eyes Julianus' text preserved to us in fr. 51, h. t., and this is proved by the fact that the quotation from Julianus in fr. 11, § 2 corresponds to § 1 in fr. 51. Besides Julianus is quoted in all paragraphs of fr. 11, except the § 3 from which the question arises. The opinion maintained in this paragraph is attributed to Celsus and Marcellus, so it is very difficult to suppose that Julianus acceded to it, the more so considering that Ulpian's fragment, even in the form it has in the Corpus Juris, preserves vestiges of an ancient controversy :—

quod et Marcello videtur ET EST PROBABILIS.

If the opinion adopted by Marcellus was the more probable, there must have been another opinion which Ulpian thought less probable. At least in reading fr. 51 pr. it is very easy to perceive that Julian was expounding a theory of his own, of which he tries to persuade the reader.'

It is strange that after collecting so clearly the main arguments in favour of the prevalent opinion the clever Romanist should repel it. He is induced to disregard the arguments collected because of fr. 15, § 1; but, it being proved, as he himself admits, that in fr. 15 another case is considered, how can they be disregarded? Professor Ferrini's new theory is supported by arguments by far less convincing, and cannot be maintained against Pernice's any more than Grueber's earlier theory.

The two recent writers have then thrown no new light on the matter, and our opinion may still live prosperously in spite of the premature death knell¹.

G. PACCHIONI.

¹ The practical solution of the controversy is quite different from the scientific in regard to Justinian's compilation. The writers are generally inclined to accept Ulpian's opinion, but considering the progress of medicine in our age we think Julian's theory is to be preferred. See Castellarì, Arch. Giur. xxii. p. 356 and following.

[I am not sufficiently versed in the Digest to have a decided opinion as to what Julianus was capable of. But I cannot help thinking that a Roman lawyer who held that an action would lie for killing a man before the man was dead would have seemed to his colleagues *capable de tout*; and, with all deference to specialists in Roman law, I submit that we ought to have stronger and less ambiguous evidence before we attribute such a view to any lawyer of the classical period.—EDITOR.]

THE CANADIAN CONSTITUTION¹.

THE Dominion of Canada consists of seven organized provinces, one organized district, and a vast extent of territory sparsely inhabited, and known as the North West Territories. The area and population of the different provinces vary very widely as the following table shows:—

ing table shows:

					<i>Area in Square Miles.</i>		<i>Population.</i>
Ontario	...	...	...	...	101,731	...	1,923,228
Quebec	...	...	...	...	188,688	...	1,359,027
Nova Scotia	...	...	...	...	20,909	...	440,572
New Brunswick	...	...	...	...	27,174	...	321,233
Manitoba	...	...	...	...	123,200	...	65,954
British Columbia	...	...	...	...	341,305	...	49,459
Prince Edward's Island	...	...	...	...	2,133	...	108,891
District of Keewatin	}	...	3,000,352	...		...	56,446
North West Territories							
					<u>3,805,492</u>		<u>4,324,810</u>

The union of the Canadian Colonies in a federation was a favourite idea with individual statesmen from time to time. It was advocated by Lord Durham in the Durham Report. More than once the subject was debated in one or other of the legislatures, and in 1858 it was part of the policy of the Cartier-Macdonald administration, but it was not until 1861 that any definite steps were taken to carry the suggestion into practical effect. In that year the legislature of Nova Scotia passed a resolution in favour of the union of the maritime provinces. This resolution was transmitted to the Duke of Newcastle, then Secretary of State for the Colonies, and by him it was forwarded to the Governor-General and the Lieutenant-Governors of the other North American colonies. The Lieutenant-Governors communicated the resolution to their respective legislatures, and the legislature of each maritime province resolved that delegates should be appointed to confer with delegates of the other provinces, 'for the purpose of discussing the expediency of a union of the three provinces under one government and legislature.' Up to this point the important and leading colony of Canada had held aloof from the proposed union, but a few of the leading politicians fortunately saw that a union offered an opening from the deadlock that had occurred in party government in the colony. When Upper and Lower Canada

¹ A portion of a forthcoming work on 'The Canadian Constitution.'

were united in 1840, Lower Canada possessed the larger population, but in a few years, owing to constant immigration, the population of Upper Canada came to exceed that of Lower Canada by 250,000. A demand arose in the former province for a re-adjustment of representation in the legislature, and 'representation in proportion to population' became the important political question of the day. Parties at length became so balanced that from the 21st May, 1862, to the end of June, 1864, there were no less than five different ministries in office, and the efficient conduct of public business became impossible. In the meantime the Nova Scotia proposal had been communicated to the legislature, and on the defeat of the Taché-Macdonald ministry in 1864 overtures were made by the opposition to Sir John Macdonald, which resulted in the formation of a coalition ministry pledged to the adoption of a federal union of the colonies. Permission was asked and given to attend the meeting of the delegates of the maritime provinces, which was held soon after at Charlottetown.

The conference came to the conclusion that a union of the maritime provinces by themselves was impracticable, but that a union of all the colonies was possible and desirable. In order to discuss this wider issue a second conference met at Quebec on the 10th October, 1864. Twelve delegates were present from Canada, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward's Island, and two from Newfoundland. After eighteen days' deliberations, 72 resolutions were agreed upon as the basis of union, the delegates undertaking to submit the resolutions to their respective legislatures, and to use every legitimate means to ensure the adoption of the scheme.

Early in the year 1865, the Canadian legislature expressed its approval of the Union by votes of 45 to 15 in the Council, and 91 to 33 in the Assembly. In New Brunswick the general election of 1865 resulted in the return of an Assembly hostile to the proposal. The Council in the following year declared for the Union: the ministry resigned and a general election followed, and the new Assembly adopted the scheme. The hostility of New Brunswick affected Nova Scotia, but in 1866 the Assembly adopted the Quebec resolutions by a large majority. Prince Edward's Island and Newfoundland declined to enter the Union.

Three provinces had now given their consent subject to certain modifications desired by the two maritime provinces. All differences were adjusted at a Conference held in London in Dec. 1866, and in Feb. 1867 Lord Carnarvon introduced a bill 'for the union of Canada, Nova Scotia, and New Brunswick and the government thereof and for purposes connected therewith.' The measure obtained

the support of all parties, and received the royal assent on the 29th March.

The Act authorized Her Majesty in Council to declare by proclamation that on and after a certain day the provinces of Canada, Nova Scotia, and New Brunswick should form one Dominion under the name of Canada. Such proclamation was issued on the 22nd May, 1867, and the 1st day of July of that year was fixed as the date from which the Union should take effect. The Act made provision for the admission of Prince Edward's Island, British Columbia, Newfoundland and the North West Territories into the Union. British Columbia was admitted by Order in Council, dated the 16th day of May, 1871, as from the 20th July, 1871. Prince Edward's Island was admitted by Order in Council dated the 26th June, 1873, as from the 1st day of July, 1873. The North West Territories were ceded to Canada by Order in Council, dated the 24th June, 1870. Some doubt existed as to the power of the Dominion Parliament to form new provinces out of these territories, and the Imperial Act, 34 & 35 Vict. c. 28, was passed to confer such power. A further Imperial Act (49 & 50 Vict. c. 35) was passed in 1886 to enable the Dominion to provide for the representation of territories not forming part of any province in the Senate and House of Commons of Canada. These last mentioned Acts have greatly increased the legislative powers of the Dominion. Under their provisions the new province of Manitoba was created in 1870, and provision has been made for the government of the North West Territories. Five districts have been organized in the Territories, viz. Keewatin, which has been placed under the Lieutenant-Governor of Manitoba and Assiniboia, Saskatchewan, Alberta, and Athabasca, forming that portion of the territories lying between Manitoba and British Columbia.

It is impossible in the limits of one article to give a detailed account of the Canadian Constitution. There is a popular impression that an adequate description of that Constitution can be found within the four corners of the Union Act of 1867, when as a matter of fact the student must gather his information from six different sources. (1) English Statute Law. Reference has already been made to important statutes relating to Canada and passed after 1867. (2) Canadian Statutes. The qualification of electors to the House of Commons, the qualification of members, the constitution of the North West Territories, the organization of the departments of state and the constitution of Courts of Justice are, for instance, regulated by Canadian Statutes. (3) Provincial Statutes. Though the leading features of the constitutions of Ontario and Quebec are found in the Act of Union, many details of the constitutions of the other provinces are only to be found in the Statutes of the Provinces,

e.g. the law relating to the franchise. (4) Imperial Orders in Council. The most important Imperial Orders in Council are those already referred to, admitting British Columbia, Prince Edward's Island, and the North West Territories into the Union. (5) Dominion and Provincial Orders in Council. These sometimes contain important regulations. The Government of the North West Territories is, subject to the provisions of the statute-law, carried on by a Lieutenant-Governor and Council, subject to Orders in Council issued by the Governor-General in Council. (6) Orders and rules of the Dominion Parliament and Provincial Legislatures. (7) Usages. These orders, rules and usages govern the procedure in the Dominion Parliament and the provincial legislatures from day to day, and regulate the method of legislation.

I. DISTRIBUTION OF LEGISLATIVE POWER.

The framers of the Canadian Constitution in distributing the legislative power have not followed the United States principle of reserving certain specific subjects to the central legislature, and leaving what remains to the provincial legislatures. Nor have they adopted the opposite principle of delegating specific subjects only to the provinces. Both methods have been partially followed, and an attempt has been made to enumerate the respective powers of the Dominion and the Province. The framework of the Act is briefly as follows. The Dominion Parliament has a general power to make laws for the peace, order, and good government of Canada, and certain subjects are in addition specifically assigned to it. This legislative power is limited in two ways: (1) by the indirect reservation of certain matters to the Imperial Parliament; and (2) by the powers assigned to the Provincial Legislatures. Whenever a dispute arises regarding the validity of a provincial Act, the first question the Court has to decide is this:—Does the subject-matter fall within any of the matters assigned to the provinces? If it does not, then the Act is *ultra vires*; but if it does, then this second question arises:—Whether the *prima facie* right of the province to pass the Act is not overborne by the powers given to the Dominion¹, or reserved indirectly to the Imperial Parliament?

That the whole sphere of legislation has not been surrendered by the Imperial Parliament is clear from the following restrictions on the legislative powers of the Dominion and the provinces:—

1. The Dominion has only a limited power of altering its Constitution². It cannot apparently abolish either of the Houses of

¹ *Citizens Insurance Co. v. Parsons*, 45 L. T. N. S. 721; *Bank of Toronto v. Lambe*, L. R. 12 App. Cas. 575.

² See *post*, p. 190.

Parliament, nor can it alter the number or qualification of senators, nor increase or diminish the number of representatives in the House of Commons except within narrow limits. A province has greater power in these respects than the Dominion.

2. After granting a constitution to a new province the Dominion Parliament cannot alter it¹.

3. No protective duties can be imposed as between the provinces².

4. Lands and public property belonging to Canada or the provinces cannot be taxed³.

5. Acts of the Parliament of Great Britain or of the Parliament of Great Britain and Ireland existing in any of the provinces at the time of the Union can only be repealed, abolished, or altered by Imperial legislation⁴.

6. The seat of the Government can be changed only by Her Majesty⁵.

In the British North America Act 1867, little attempt has been made to classify the powers of the Dominion and Provincial Legislatures respectively. The 91st and 92nd sections contain the attempted enumeration of the chief subjects of legislation. The former section relates to the Dominion, and begins with a general clause, 'it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces,' and then 'for greater certainty, but not so as to restrict the generality' of the clause just set out, proceeds to enumerate twenty-nine classes of subjects over which the Dominion is to have 'exclusive authority.' The 92nd section, after enumerating fifteen classes of subjects over which the legislature of a province is to have exclusive authority, ends with a general clause giving to a province legislative power over 'generally all matters of a merely local or private nature in the province.' Several of the other sections of the Act, e. g. 41, 65, 93, 94, 95, 101, contain very important provisions regarding legislative powers, and since 1867 three important Imperial Acts⁶ have been passed, increasing the legislative powers of the Dominion.

The various powers may be conveniently classified under 17 heads, viz. (1) Amendment of the Constitution; (2) Extension and Formation of Provinces; (3) Treaties; (4) Public Property; (5) Public Debt and Taxation; (6) State Management and Admin-

¹ 34 Vict. c. 28. s. 2.

² B. N. A. Act 1867, s. 121.

³ *Ib.* s. 125.

⁴ *Ib.* s. 129.

⁵ *Ib.* s. 16.

⁶ 34 & 35 Vict. c. 28; 38 & 39 Vict. c. 38; 49 & 50 Vict. c. 35.

istration ; (7) Administration of Justice ; (8) Status ; (9) Education ; (10) Property and Civil Rights ; (11) Trade and Commerce ; (12) Monopolies ; (13) Money and Banking ; (14) Agriculture ; (15) Immigration ; (16) Local Affairs ; (17) Alteration of laws existing at the time of the Union.

1. *Powers relating to the Constitution.*

The Dominion has no control over the office of Governor-General, though his salary is borne by Canada. The Lieutenant-Governors are appointed by the Governor-General on the advice of his ministers, and are removable by him on like advice¹. The Parliament may provide for the representation of new provinces², and of territories not within a province³ in the Senate, and fix the number of senators requisite to form a quorum⁴.

As regards the House of Commons the Dominion has power to legislate on the distribution of seats, the qualifications and disqualifications of members, the voters at elections, the oaths to be taken by voters, the powers and duties of returning officers, the proceedings at elections, the trial of election petitions, the vacating of seats, and the execution of writs for new elections. It may make provision for the absence of the Speaker, and subject to the conditions laid down by the Act it may adjust the representation after every decennial census.

A province has a general power to amend its constitution, except as regards the office of Lieutenant-Governor⁵. The effect of this provision is that a provincial legislature has not only similar powers to those enumerated above as belonging to the Dominion, but it may, in case the legislature consists of two houses, abolish either house. The powers of the provincial legislature are however limited by several provisions in the Act of Union. For instance, the provisions relating to Appropriation and Tax Bills, the recommendation of money votes, the assent to bills, and the disallowance of Acts⁶, are binding on all the provincial legislatures, and cannot be altered except by the Imperial Parliament. Apart from the abolition of either house, the power of amending the constitution practically gives the provinces the right of determining the number, qualification, and election of members of the legislature.

By the 38 & 39 Vict. c. 38, the Imperial Parliament authorized the Dominion Parliament to define by Act the privileges to be enjoyed by the Senate and House of Commons, and by the members thereof, provided such privileges did not exceed those enjoyed by

¹ B. N. A. Act, s. 92 ; *The Letellier Case*, Todd p. 405.

² 49 & 50 Vict. c. 35.

³ *Ib.* s. 90.

⁴ B. N. A. Act 1867, s. 35.

⁵ 34 & 35 Vict. c. 28.

⁶ *Ib.* s. 92 (1).

the House of Commons in England at the passing of such Act. No reference was expressly made in the Union Act to the privileges of the Provincial Legislatures, and when Ontario in the Session 1868-9 passed an Act conferring on its Legislative Assembly the same privileges as were enjoyed by the Dominion House of Commons, the validity of the Act was doubted. The opinion of the law officers of the Crown in England was then taken, and as they held that the Act was *ultra vires*, it was disallowed. The view of the English law officers did not meet with general support, and when Quebec in 1870, British Columbia in 1871, and Ontario in 1876 passed similar Acts, they were allowed to come into operation. The provisions of the Quebec Act regarding the summoning of witnesses came before the Courts in *Ex parte Dansereau*¹, and the appeal side of the Quebec Court of Queen's Bench held that a power of summoning witnesses was necessarily incident to the powers of a legislature, and that a provincial legislature had 'a right to exercise such powers and privileges as were mere incidents of the powers specifically vested in them, and without which they could not probably exercise the duties devolving upon them.' In *Landers v. Woodworth*², the Supreme Court of Canada held that in the absence of express legislation the Legislative Assembly of Nova Scotia had no power to remove one of its members for contempt unless he was actually obstructing the business of the House. It would therefore seem (1) that a provincial legislature has apart from provincial legislation those implied powers and privileges which are absolutely essential for the discharge of its duties; and (2) that any other privileges cannot be enjoyed or exercised in the absence of legislation. The validity of such legislation might be supported on one of two grounds, viz. (1) the power of amending a provincial constitution, a view taken by Sanborn, J. in *Ex parte Dansereau*; (2) the powers possessed by each province at the time of the Union, inasmuch as the Union Act has not taken away all of such powers.

2. *Extension and formation of Provinces.*

The Dominion Parliament may (1) extend the limits of a province with the consent of the legislature of such province³; (2) establish new provinces and provide for the constitution and administration of such provinces; and⁴ (3) provide for the government of any territory not within the limits of any province. Under this last-mentioned power provision has been made for the government of the North West Territories.

¹ 19 L. C. Jurist 210; 2 Cart. 165.

² 34 Vict. c. 28.

³ Can. S. C. R. 158; 2 Cart. 220.

⁴ *Ib.*

3. *Treaties.*

No treaty-making power has been conferred on the Dominion, but the Canadian Parliament may exercise all powers necessary for performing the obligations of Canada, or of any province thereof as part of the British Empire, towards foreign countries arising under treaties between the empire and such foreign countries ¹.

4. *Public Property.*

'The Public Property' of the Dominion is placed under the Dominion Parliament, whilst a provincial legislature has 'the management and sale of the public lands belonging to the province and of the timber and wood thereon ².' Under the head of provincial property is included the banks and beds of rivers ³.

5. *Public Debt and Taxation.*

(a) The Public Debt of Canada is under the jurisdiction of the Dominion ⁴. The Dominion may borrow on the 'public credit ⁵,' and a province on the 'sole credit of the province ⁶.'

(b) Direct Taxation within the province, for the purpose of raising a revenue for provincial purposes, is the exclusive function of a province. The meaning of 'direct' taxation was discussed in *A. G. for Quebec v. Queen Insurance Company* ⁷, and in the more recent case of *The Bank of Toronto v. Lambe* ⁸. In the former case a Quebec Act requiring insurance offices other than marine offices to take out a licence in every year, and pay for such licence by an adhesive stamp affixed to every policy or receipt, was held *ultra vires* inasmuch as it was in reality a Stamp Act, and therefore imposed an indirect tax. In the latter case a Quebec Act imposing a tax on banks varying in proportion to the paid up capital, and on Insurance Companies based on a sum specified in the Act, was held to be valid on the ground that the Act was designed to impose the tax finally on the Corporations who had to pay it, though it was possible that the Corporations might circuitously recoup themselves out of the pockets of their customers. The tax need not necessarily be for general provincial purposes ⁹, and it is immaterial that the persons taxed are not domiciled in the province ¹⁰.

One restriction exists on the power of a province to impose direct taxation: it cannot tax the income of Dominion officers residing in the province. To do so would be to lower the salaries

¹ B. N. A. Act, s. 132.

² *Ib.* s. 92 (5).

³ *R. v. Robertson*, 6 C. S. C. 52.

B. N. A. Act, s. 91 (1).

⁴ *Ib.* s. 91 (4).

⁵ *Ib.* 92 (3).

⁷ 16 C. L. J. N. S. 198; L. R. 3 App. Ca. 1090.

⁸ L. R. 12 App. Ca. 575.

⁹ *Dow v. Black*, L. R. 6 P. C. 272.

¹⁰ *Bank of Toronto v. Lambe*, *supra*.

of such officers, and by section 91 (8) of the Union Act the Dominion has the sole power of regulating the salaries of its officials¹.

(c) *Indirect Taxation.* The Provinces are authorized to impose 'shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local, or municipal purposes².' All other indirect taxes can be levied by the Dominion alone, subject to the condition that no protective duty be levied as between provinces³. The powers of a province to impose the above licences are extended by the powers referred to afterwards to regulate 'municipal institutions,' as the maintenance of order in towns, and the prevention of intemperance imply restrictions on the sale of liquors which may be best affected by licences. The raising of taxes by means of licences is a limitation of the Dominion right of legislating on 'trade and commerce.'

6. *State Management and Administration.*

Under this head may be classified the following matters:

i. *Public Safety.* The Dominion has sole jurisdiction in matters relating to (a) the Militia, Military and Naval Service and Defence⁴, (b) Quarantine.

ii. *Public Works and Means of Communication.*

To the Dominion is assigned :

(a) The Postal Service⁵.

(b) Navigation and Shipping⁶.

(c) Ferries between a province and any British or foreign country, or between two provinces⁷.

(d) Lines of Steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting a province with any other province, or extending beyond the limits of a province⁸.

(e) Lines of steamships between the province and any British or foreign country⁹.

(f) Such works as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the advantage of two or more provinces¹⁰.

The Provinces, on the other hand, have legislative jurisdiction over 'local works and undertakings,' not coming within the last three classes¹¹.

(g) The establishment and maintenance of marine hospitals are assigned to the Dominion; all other kinds of hospitals, as well as

¹ *Lephrohon v. City of Ottawa*, 2 Ont. App. R. 522.

² B. N. A. Act, s. 92 (9).

³ Ib. s. 125.

⁴ Ib. s. 91 (7).

⁵ Ib. s. 91 (5).

⁶ Ib. s. 91 (10).

⁷ Ib. s. 91 (13).

⁸ Ib. s. 91 (10).

⁹ Ib.

¹⁰ Ib.

¹¹ Ib.

asylums and charities for a province, are placed under the province ¹.

iii. **Matters of State Management.**

The Dominion has sole jurisdiction over :

(a) The sea coast ².

(b) Beacons, buoys, lighthouses, and Sable island ³.

(c) Inland Fisheries. As regards fisheries, the Dominion powers do not extend over the bed of a river, nor can they affect the rights of individuals therein. They are limited to the regulation, protection, and preservation of fisheries, and therefore the grant of a right to fish in a provincial river was held invalid ⁴.

(a) The Census ⁵.

(b) Statistics ⁶.

(c) Weights and measures ⁷.

iv. **The Civil Service.** The Dominion and the Provinces may pass laws necessary for carrying on the administration and departments of State within the Dominion and the Provinces respectively. Several sections of the Union Act refer to the Dominion Civil Service. The Dominion may

(a) Fix and provide for the salaries of the Governor-General and the Lieutenant-Governors ⁸.

(b) Fix and provide the salaries and allowances of civil and other officers of the Government ⁹.

(c) Fix and provide the salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the courts of probate in Nova Scotia and New Brunswick), and of Admiralty Courts in cases where the Judges are paid by salary ¹⁰.

To the Provinces is given the legislative powers regarding 'the establishment and tenure of provincial officers and the appointment and payment of provincial officers ¹¹.'

7. *The Administration of Justice.*

The relations of the Dominion and the Provinces to the administration of justice may be considered under the heads of (1) the constitution and procedure of Courts, (2) the appointment of Judges, (3) Criminal Law, (4) Prisons.

i. The constitution, maintenance, and organization of Civil Courts, including procedure in civil matters, in a province is assigned to the province ¹² subject to following Dominion powers.

(a) The Dominion may constitute, maintain and organize a general Court of Appeal for Canada, and establish any additional

¹ B. N. A. Act, s. 91 (11) and s. 92 (7).

⁴ *E. v. Robertson*, 6 Can. S. C. R. 52.

¹¹ Ib. s. 91 (17).

¹² Ib. s. 92 (4).

² Ib. s. 91 (12).

³ B. N. A. Act, s. 91 (6).

⁵ Ib. s. 91.

⁶ Ib. s. 91 (9).

⁷ Ib.

⁸ Ib. s. 100.

courts for the better administration of the laws of Canada¹. Under this section an Exchequer Court and a Supreme Court for the whole dominion were established in 1875, and in 1877 a Court of Maritime Jurisdiction was established in Ontario.

(b) The Dominion is empowered to establish a court for the trial of election petitions², and in 1874 the then existing Supreme Provincial Courts were authorized to try election petitions in connection with the election of members of the Canadian House of Commons.

The constitution of courts of criminal jurisdiction, including criminal procedure, is vested in the Dominion³, subject to the limitation that in so far as a province is invested with the power to make penal laws referred to below, it has an implied power to regulate the procedure for enforcing such laws⁴.

ii. The Governor-General appoints Judges of the Superior, District, and County Courts in the Provinces. For inferior Courts, the right of appointment belongs to the Province⁵, but a Lieutenant-Governor cannot, in the absence of a statutory power, appoint justices of the peace, inasmuch as he is not, like the Governor-General, authorized to exercise that prerogative of the Crown.

iii. 'Criminal Law, except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters,' belongs to the Dominion, subject to the following limitation:

'The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter arising within any of the classes of subjects enumerated in section 92,' is vested in a province⁶. A limited criminal jurisdiction is thus given to the provinces. This jurisdiction cannot be used to enforce a law of the province by declaring Acts to be offences, which are already offences by the Criminal Law of the Dominion. An attempt was made in one case⁷, similar to that made in some English cases⁸, to distinguish between acts called offences, viz. those punishable by magistrates, and acts called crimes, viz. those punishable on indictment, and it was suggested that the former acts were within provincial jurisdiction, but the decision was not based on such a distinction. It is in regard to temperance legislation that the most important questions have arisen as to the criminal jurisdiction of the Provinces.

iv. Prisons. The establishment, maintenance and management of penitentiaries or prisons, are powers that can be exercised by both the Dominion and the Provinces⁹.

¹ B. N. A. Act, s. 101.

² *Ib.* s. 41.

³ *Ib.* s. 91 (27).

⁴ *Pope v. Griffith*, 16 L. C. Jurist 169.

⁵ B. N. A. Act, ss. 92 (14), 96.

⁶ *Ib.* s. 92 (16).

⁷ *E. v. Lawrence*, 43 U. C. Q. B. 164.

⁸ See remarks of Martin B. in *A. G. v. Radloff*, 10 Ex. p. 96.

⁹ B. N. A. Act, ss. 91 (28), 92 (6).

8. *Status.*

Naturalisation, aliens, Indians and Indian lands reserved for the use of Indians are within Dominion jurisdiction¹. So too is marriage and divorce, except that laws relating to the solemnisation of marriage within a province are to be made by such province².

9. *Education.*

In every province the legislature may make laws in relation to education, subject to the following conditions:

(a) The rights and privileges enjoyed by denominational schools at the time of the Union are not to be prejudicially affected.

(b) The powers and privileges enjoyed by Roman Catholic Schools in Upper Canada are extended to the dissentient schools of Protestants and Roman Catholics in Quebec.

(c) An appeal lies to the Governor-General in Council against any provincial act or decision affecting any right of the Protestant or Roman Catholic minority in any province where a system of separate or dissentient schools is established.

In case any provincial law requisite in the opinion of the Governor-General in Council for carrying out the above provisions is not made, or in case the decision of the Governor-General in Council in any appeal under the section is not duly executed, the Parliament of Canada may pass any laws requisite for carrying out the above provisions or the decision of the Governor-General on any such appeal.

10. *Property and Civil Rights.*

'Property and Civil Rights in the Province' are assigned to the Provinces³, and 'bankruptcy and insolvency' to the Dominion⁴.

The jurisdiction of a province over property and civil rights within its limits is absolute, and therefore the Ontario legislature was held to be within its powers when it passed an Act dividing a testator's property in a way different to that provided by his will. Property includes property in fisheries, and a province may regulate the transfer of rights in fisheries. In 1881 the important question arose whether a debt belonging to a person domiciled elsewhere could be said to fall within 'property and civil rights in the province,' in view of the acknowledged rule that the locality of a debt is determined by the domicile of the creditor. The Ontario Court of Queen's Bench declined to limit the clause, and held that debts

¹ B. N. A. Act, s. 91 (24), (25).

² *Ib.* s. 92 (13).

³ *Ib.* ss. 91 (26), 92 (12).

⁴ *Ib.* s. 91 (21).

contracted under a provincial Act could be dealt with by the legislature irrespective of the domicile of the creditor¹.

Some of the specific subjects assigned to the Dominion relate to Property and Civil Rights, such as Bankruptcy and Insolvency, Patents, Copyright, and Indian lands. Perhaps the most important of these limitations is that relating to Bankruptcy and Insolvency. The meaning of these words was discussed in *L'Union St. Jacques v. Bélisle*², where it was held that they referred to general legislation on the subject. 'The words describe in their known legal sense provision made by law for the administration of the estates of persons who may become bankrupt or insolvent according to rules and definitions prescribed by law, including, of course, the conditions under which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.' Hence when the Dominion passed an Act relating to the liquidation of building societies in Quebec, and not applying to the whole Dominion, it was held *ultra vires*³.

11. Trade and Commerce.

'The regulation of trade and commerce' belongs to the Dominion. The difficulty of defining these words was admitted by the Judicial Committee of the Privy Council in the *Citizens Insurance Company v. Parsons*⁴. The words it was said 'would include political arrangements, in regard to trade requiring the sanction of parliament, the regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulations of trade affecting the whole dominion,' but it was added 'their lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament.' They decided however that the Dominion had not power to regulate the contracts of a particular trade, such as the business of fire insurance, in a single province. The powers of the Dominion Parliament in regard to trade are limited by the implied power that the provinces have of passing laws necessary to give effect to the powers of legislation expressly conferred on them. For instance, the regulation of 'municipal institutions' enables a province to prohibit the sale of articles in the street⁵, and the power to deal with 'local matters' was held to justify a Quebec Act, imposing qualifications on persons engaged in selling drugs and medicines⁶.

¹ *Nickle v. Douglass*, 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.

² L. R. 6 P. C. 31. ³ *McClanaghan v. St. Anne's Society*, 24 L. C. J. 162.

⁴ L. R. 7 App. Ca. p. 112.

⁵ *Re Harris and the Corporation of the City of Hamilton*, 44 U. C. Q. B. 641.

⁶ *Bennett v. Pharmaceutical Association of Quebec*, 1 Dorions Q. App. 336.

12. *Monopolies.*

To the Dominion is assigned:

- (a) Patents of Invention¹ and Discovery¹.
- (b) Copyrights².
- (c) The incorporation of banks³.

Excepting banks a province may incorporate any company 'with provincial objects.'

13. *Money and Banking.*

The Dominion has assigned to it:

- (a) Currency and Coinage⁴.
- (b) Issue of paper money⁵.
- (c) Legal tender⁶.
- (d) Bills of Exchange and Promissory Notes⁷.
- (e) Banking and Incorporation of Banks⁸.
- (f) Savings banks⁹.
- (g) Interest¹⁰.

14. *Agriculture.*15. *Immigration.*

As regards agriculture in and immigration into a province, concurrent powers of legislation have been conferred on the Dominion and the Provinces, subject to the condition that a provincial law on either subject is only to be in force in so far as it is not repugnant to any Dominion Act¹¹.

16. *Local Matters.*

The Provinces have exclusive jurisdiction in

- 1. 'Municipal institutions in the province¹².'
- 2. 'Generally all matters of a merely local or private nature in the province¹³.'

But it is provided that matters assigned to the Dominion by section 92 are not to be deemed local matters in any province. The efforts of several provinces to regulate the liquor traffic by Act of the legislature, were questioned on the ground that all such Acts were illegal, as they constituted an interference with 'trade;' but in *Hodge v. The Queen*¹⁴ the validity of such Acts was upheld on the ground that they related to municipal or local matters and were in the nature of police regulations. In another case¹⁵ a New Brunswick Act authorizing the inhabitants of a parish within the province to raise a subsidy by local taxation for the

¹ B. N. A. Act, s. 91 (22).

² *Ib.* s. 91 (23).

³ *Ib.* s. 92 (11).

⁴ *Ib.* s. 91 (14).

⁵ *Ib.* s. 91 (15).

⁶ *Ib.* s. 91 (20).

⁷ *Ib.* s. 91 (18).

⁸ *Ib.* s. 91 (15).

⁹ *Ib.* s. 91 (19).

¹⁰ *Ib.*

¹¹ *Ib.* s. 95.

¹² *Ib.* s. 92 (8).

¹³ *Ib.* s. 92 (16).

¹⁴ L. R. 9 App. Ca. 117.

¹⁵ *Dow v. Black*, L. R. 6 P. C. 272.

construction of a railway was a 'local' matter, even though the railway was to be continued beyond the province.

17. *Alteration of Laws existing at the time of the Union.*

Laws existing at the time of the Union can be altered by the Dominion or the Provinces, according as the subject-matter falls within the classes of subjects assigned to the Dominion or the Provinces by the Union Act, subject to the proviso that Acts of the Imperial Parliament existing in 1867 and applying to the Provinces can only be altered by such Parliament.

This brief survey of the distribution of legislative power between the Dominion and the Provinces would be incomplete were attention not called to the important principle involved in the general words used at the beginning of section 91, and already quoted, viz. that if any matter does not fall within any of the classes of subjects assigned exclusively to the provincial legislatures, and has not been reserved directly or indirectly to the Imperial Parliament, then the Dominion Parliament may legislate in regard thereto under the general power 'to make laws for the peace, order, and good government of Canada.' This principle was applied in *Russell v. The Queen*¹, when the validity of a temperance law of the Dominion was upheld.

The validity of a Dominion or Provincial Act can always be raised in any Court of Law, an appeal lying ultimately by grace if not of right to the Judicial Committee of the Privy Council.

II. CONTROL OF THE PROVINCES BY THE DOMINION.

The Governor-General and Privy Council or Ministry of the Dominion have within very definite limits a certain degree of control over the Provincial Administrations and Legislatures.

1. The Lieutenant-Governors are appointed and are removable by the Governor-General acting on the advice of his ministers. The Lieutenant-Governor is therefore a Dominion officer, and is responsible to the Dominion Government for the proper discharge of his duties. The Dominion ministry is in turn responsible to the House of Commons, and in this way the House can control the conduct of the Lieutenant-Governors. The circumstances under which Lieutenant-Governor Letellier dismissed his ministers in 1878 in Quebec resulted in a demand being made for his dismissal. The Governor-General communicated the papers on the question to Parliament, and eventually both Houses agreed in censuring the

¹ 46 L. T. N. S. 889.

action of the Lieutenant-Governor. The ministry thereupon advised his dismissal, but the Governor-General being in doubt as to what course he should take, the whole matter was referred to the Home Government. The Colonial Secretary in a despatch dated the 3rd July, 1879, informed the Governor-General that Her Majesty's Government could not find anything in the circumstances to justify him in declining to follow the decided and sustained opinion of his ministers. The Lieutenant-Governor was accordingly removed.

2. As regards the provincial legislatures every Act passed must be transmitted to the Governor-General who may within one year disallow the same¹. All Acts are referred by the Governor-General to the Minister of Justice for report. In such report Acts are usually classified

- a. As being altogether illegal or unconstitutional.
- b. As illegal or unconstitutional in part.
- c. In cases of concurrent jurisdiction, as clashing with the legislation of the Dominion.
- d. As affecting the interests of the Dominion generally².

'Where a measure is considered only partially defective, or where objectionable as being prejudicial to the general interests of the Dominion, or as clashing with its legislation, communication should be had with the Provincial Government with respect to such a measure, and that in such a case the Act should not be disallowed if the general interest permit such a course until the local government has an opportunity of considering and discussing the objection taken, and the local legislature has also an opportunity of remedying the objects found to exist³.' The above extract taken from the paper drawn up in 1868 by Sir John Macdonald, Minister of Justice, and approved by the Privy Council of Canada, indicates the course which has since been followed in regard to provincial legislation. The report of the Minister of Justice after being approved of by the Council is presented to the Governor-General, who acts in accordance with its recommendations. The power of disallowance has been sparingly used. Mr. Burinot states that out of 6000 provincial Acts passed up to 1882, only 33 had been disallowed. From 1883 to 1887 inclusive only fifteen Acts have been disallowed. Some of these Acts were however disallowed on the 4th ground mentioned above, viz. as contravening the general railway policy of the Dominion as embodied in the contract with the Canadian Pacific Railway. By that contract the Dominion undertook that for 20 years from the date thereof, no railway should be allowed to be made 'south of the Canadian Pacific Railway from any point at or near the Canadian

¹ B. N. A. Act, s. 90.

² Report of Sir J. Macdonald, Can. Sess. Papers, 1869, No. 18.

³ *Ib.*

Pacific Railway, except such line as should run south-west, or to the westward of south-west: nor to within fifteen miles of latitude 49°.' The disallowance of the Manitoba Railway Acts has resulted in an unsuccessful attempt to construct a railway, notwithstanding the disallowance, and in a demand that provincial Acts shall not be vetoed so long as they are within the competence of the Provincial legislatures. In reporting to the Governor-General on the Manitoba Acts of 1885, the Committee of the Privy Council say 'the Committee whilst concurring in the report of the Minister of Justice, and humbly advising your Excellency to disallow each and every of the said Acts, desire to record the expression of their constant anxiety that the action of the legislatures of the several provinces of the Dominion should be interfered with under the power of disallowance reserved to your Excellency in Council by the B. N. A. Act, 1867, as little as possible: but that as in the case of these Acts the declared policy of Parliament adopted for the common weal is set at nought, and local legislation enacted leading indirectly, and directly too, to its frustration, the Committee of the Privy Council conceive that they are compelled by their duty to Parliament humbly to advise your Excellency to use the power in question ¹.'

III. IMPERIAL CONTROL OVER CANADA.

The Imperial control over the Dominion and the Provinces may be considered under several heads.

1. As already pointed out, the legislative powers of the Dominion and the Provinces do not exhaust the whole sphere of legislation, as several matters are reserved to the Imperial Parliament.

2. The Imperial Parliament has a concurrent legislative power in regard to all matters within the legislative jurisdiction of the Dominion or the Provinces. It was admitted, said Hagarty C.J. in *R. v. College of Physicians and Surgeons, Ontario*², 'as of course was necessary with the Federation Act before us, that if the Imperial Parliament distinctly legislate for us, they can do so notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject.' An attempt was made in the case to show that by the word 'exclusive' used in the 91st and 92nd sections, the Imperial Parliament had undertaken not to legislate on the matters enumerated, but the Court held that 'exclusive' as applied to the Dominion powers meant 'exclusive of the Provinces,' and as applied to the Provincial powers, 'exclusive of the Dominion.' Since the Union, at least twenty-seven Acts have been passed by our own Parliament relating to Canada, the

¹ Can. Sess. Papers, 1885, No. 29.

² 44 U. C. Q. B. 564.

latest being the Copyright Act, 49 & 50 Vict. c. 33; the Medical Act 1886, 49 & 50 Vict. c. 48, and the Submarine Telegraphs Act, 50 Vict. c. 3.

3. By the Act to remove doubt as to the validity of Colonial laws (28 & 29 Vict. c. 63) any Colonial law repugnant to any Act of the Imperial Parliament extending to the Colony to which such law relates, is to the extent of such repugnancy void. This statute was applied in 1881 by the Quebec Vice-Admiralty Court in the case of *The Farewell*¹, when effect was given to the Dominion Pilotage Act 1873, so far as it did not conflict with the Merchant Shipping Act 1854.

4. The Governor-General may reserve a bill for the signification of Her Majesty's pleasure, and if he assents to a bill he is required to transmit such bill to a Secretary of State. Any bill may be disallowed by the Queen in Council within two years after its receipt. Between 1867 and 1878 the Governor-Generals under their instructions reserved twenty bills, of which eleven related to divorce, and received the royal assent. One was a copyright bill, and was disallowed in 1872 as conflicting with Imperial legislation; two were extradition bills, and were disallowed; and one was a merchant shipping bill, also disallowed. In the revised instructions issued in 1878, the clauses relating to the reservation of bills were omitted, as it was thought undesirable that they should contain anything which could be interpreted as limiting or defining the legislative powers conferred by the Union Act². Since 1878 no bill has been reserved, though the Governor-General has statutory power to take such a course³.

5. The Crown has no power of vetoing a provincial bill. The Governor-General may communicate with the Home Government in regard to the disallowance of provincial bills. This course was adopted when the Ontario Legislature passed an Act defining its privileges. The opinion of the law officers of the Crown was taken, and in consequence the Act was disallowed⁴.

Attempts have been made more than once by interested parties to obtain the interference of the Imperial Government in provincial legislation, but without success. An effort was even made by the Dominion House of Commons to obtain a declaration from the English Privy Council, on the validity of an Act of New Brunswick, but the Lord President of the Council declined to interfere on the ground that the confirming or disallowing of Provincial Acts is by law vested absolutely and exclusively in the Governor-General⁵.

¹ 7 Quebec L. R. 380.

² B. N. A. Act, 1867, s. 55.

³ Can. Sess. Papers, 1877, No. 89.

⁴ Can. Sess. Papers, 1877, No. 3.

⁵ Todd's Parl. Gov. p. 365.

6. The Governor-General is appointed by the Imperial Government, and to the Imperial Government he is responsible. Whilst he is expected to act in all Canadian matters on the advice of his ministers, it is his duty where Imperial interests are concerned to exercise if necessary an independent judgment. It is always open to him to seek advice from the Home Government, and the Home Government has the power (not likely to be used) of issuing formal instructions for his guidance.

It only remains to point out the provisions that have been made for enforcing the judgments or orders of the Supreme Court of Canada in the Provinces. By section 105 of the Revised Statutes of Canada (49 Vict. c. 135) it is enacted that 'the process of the Supreme Court and the process of the Exchequer Court shall run throughout Canada and shall be tested in the name of the Chief Justice, or in case of the vacancy in the office of Chief Justice in the name of the senior puisne judge of the Court, and shall be directed to the sheriff of any county or other judicial division into which any province is divided: and the sheriffs of the said respective counties or divisions shall be deemed and taken to be *ex officio* officers of the Supreme and Exchequer Courts respectively, and shall perform the duties and functions of sheriffs in connection with the said Courts, and in any case where the sheriff is disqualified such process shall be directed to any of the coroners of the county or district.'

J. E. C. MUNRO.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Trial of Muluk Chand for the Murder of his own Child: a Romance of Criminal Administration in Bengal. With an Introduction by W. A. HUNTER, M. P. London: T. Fisher Unwin. 1888. 8vo. vi and 96 pp.

THE facts of this case are as follows:—Muluk Chand was a village watchman and cultivator, residing in the village of Bhulat, in the Bongong subdivision of the Nuddea district, not a hundred miles from Calcutta. He had, amongst other children, two little girls, named Nekjan and Golak Mani, aged about nine and seven years respectively. One night in March 1882, Muluk Chand and these two little girls were sleeping on the verandah of his homestead, his wife, with two other younger children, having gone to a neighbouring village for some money the evening before, and stayed there for the night. Near the verandah, on which the father and his little girls slept, were some vegetables growing in a patch of cultivated ground, and a strange bull had often come at night to eat them. Muluk Chand, having suffered from the predatory visits of this animal, was on the watch for him; and in order to drive him off kept beside his bed on the verandah a log of wood, which formed part of the rude machine with which the rice was husked for the use of the family. On the night of the occurrence, which was dark and cloudy, Muluk Chand heard what he supposed to be the approach of the bull to the vegetables, and in order to frighten him away threw the log of wood in the direction from which the sound came. He was at once, however, apprised by the cry of his child Nekjan that the log of wood had struck her. She had gone down off the verandah to attend a call of nature (such are the primitive habits of these people), and the sound heard by Muluk Chand was made by her and not by the bull. The log of wood had struck the child on the back between the shoulders, and the blow proved almost immediately fatal. The Bengalee peasant is usually most fond of his offspring, and the unhappy father was distracted at the unfortunate accident through which his own hand had deprived his child of life. But grief was soon overborne by other considerations. Muluk Chand, being a village watchman and so affiliated to the regular police, well knew that sudden and unnatural deaths must be reported at the nearest police-station; that the death of his child must therefore be so reported; and that the officer in charge of the police-station would thereupon come to hold an inquest. He knew what this would involve—knew it well, as an underling who had doubtless been present on many occasions when a police-officer, attended by a number of constables and village watchmen, had gone to inquire into a sudden or unnatural death, and they were all fed and feasted by the unfortunate householder in whose habitation the visitation had taken place: and the officer, unless a present were forthcoming, commensurate with his rank and the possible gravity of the case, saw circumstances of

suspicion which necessitated the forwardal of the householder to the headquarters of the district, entailing absence from home and family and the expenses of employing *mukhtars* or attorneys, even if no worse consequences followed. Muluk Chand therefore determined to conceal the fact that the child had met her death by his hand, fearing that, unless he could pay a large sum to the police, the idea of accident would be scouted and intentional injury would be charged against him. His brother-in-law advised him to represent that the child had died of snake-bite; and, in order to give colour to this story, slightly punctured the abdomen of the little corpse to make it appear that a snake had bitten her in a vital part.

The death of the child was accordingly reported at the police-station as caused by the bite of a snake. A police officer came and made an inquiry, and forwarded the body for examination by a medical officer. This examination was conducted in a very perfunctory manner by a native hospital assistant, who, finding a punctured wound on the abdomen, jumped at the conclusion that this was the cause of death and that the child had been murdered. The *post mortem* examination did not extend to a careful inspection of the other parts of the body, as it should have done.

The case being then one of murder in the opinion of an hospital assistant possessed of little knowledge and exhibiting less care in the performance of his duties, the police set about finding the murderer, and at once pitched upon Muluk Chand. Two things were wanting, however, to support the theory of his guilt, namely, a motive for the crime, and evidence to prove its commission by him. Muluk Chand was at enmity with one Kadam Ali Fakir, who had brought a criminal charge against him, and it was for money to enable him to defend himself against this charge that Muluk Chand's wife had gone to a neighbouring village the previous evening. What could be more natural than that Muluk Chand would kill his own child for the purpose of charging his enemy, Kadam Ali Fakir, with her murder? Here was a motive at once. Then the little difficulty about evidence was got over by tutoring the little girl Golak Mani, who was sleeping with her sister on the verandah, to say that she had seen her father put his foot on this sister's throat and thrust a spear into her abdomen. Muluk Chand was accordingly committed to the Sessions on the charge of murdering his own child. The Sessions judge summed up for a conviction, dwelling strongly upon the motive 'indicated' (there was no evidence of it) by the prosecution. The man was convicted and sentenced to death. Happily, however, by the law of India such a sentence passed by a Sessions judge cannot be carried out until it is confirmed by the High Court, to which tribunal the condemned man has also the right of appeal. Public opinion was opposed to the verdict. A subscription was got up, and an able native barrister was employed to plead the case before the High Court. The learned judges of this court were of opinion that there had been a misdirection, the Sessions judge having pressed upon the acceptance of the jury a theory of motive unsupported by evidence and purely speculative. They accordingly set aside the conviction and sentence; but, having regard to the direct testimony of the child Golak Mani, they ordered a new trial. Upon this trial Muluk Chand was acquitted. He then told what had actually occurred; and Golak Mani narrated how she had been frightened by the police into telling a tutored story.

To this 'romance' of criminal administration in Bengal an Introduction is prefixed by Dr. Hunter, M.P., who observes upon the superiority of Indian to English criminal procedure in allowing a direct appeal to a higher judicial tribunal. 'Had the case occurred in England,' says Dr. Hunter,

'the only appeal would have been to the Home Secretary, and he would have been compelled to arrive at truth without the aids that a public trial affords.' We believe that the system of appeal in force in India is admirably suited to the requirements of the country and to promote the true interests of justice; and we incline to the opinion that a right of appeal in criminal cases might well be allowed in England under certain restrictions. But it must not be forgotten that the Appellate High Court in India does not hold a public trial in the sense of examining the witnesses in public; it proceeds merely upon the dead record, and the arguments are confined to the evidence therein recorded. It should also be understood that it is only in cases tried by Sessions judges that an appeal is allowed. There is no appeal when a case is tried by a judge of the High Court (who exercises the same powers as one of Her Majesty's judges in England) sitting with a jury in one of the Presidency towns.

Dr. Hunter, referring to the fact of the native hospital assistant and his European superior being present and being examined and cross-examined on the second trial, remarks that it is a singular thing that the attendance of those medical men was not compulsory, and he quotes a section of the Indian Code, which allows the deposition of a medical witness, taken by a magistrate in the presence of the accused, to be given in evidence, although the deponent is not called as a witness. Dr. Hunter has misunderstood the law. The attendance of a medical witness is just as compulsory as the attendance of any other witness when he has been duly summoned. The provision quoted is intended to meet exceptional cases. Usually the medical witness in India is a member of the Army Medical Service. Upon the outbreak of war, or upon the exigencies of the public service, he may be ordered away at a few days' or even hours' notice. He may be transferred to a distance of one hundred or one thousand or more miles from the place where he gave his deposition in the preliminary inquiry before the magistrate. He may have gone on leave to England—leave necessary to recruit his health. If his deposition could not be used at the Sessions trial under any of these circumstances, there might be a grave failure of justice. For this reason, and having regard to the fact that he is a witness unconnected with the parties or the facts of the case, and therefore presumably impartial, the law allows his deposition to be read. There is by way of safeguard a further provision in the Indian Code, which allows a witness in a criminal case to be examined by commission upon written interrogatories; and the interests of justice can thus be fully served without bringing an officer of Government hundreds of miles to the great detriment of other duties equally important.

Then Dr. Hunter unfavourably criticises a section of the Indian Evidence Act under which the Sessions judge at the first trial admitted, in order to corroborate the girl Golak Mani, the evidence of certain women who stated that on the morning after the occurrence she had told them the same story as she told in court. The Sessions judge certainly did quote this section of the Act for the admission of this evidence, but his view was not supported by the High Court. So far as the report of the case shows, the point was not raised before that tribunal, and the learned judges make no reference to it in their judgment. Dr. Hunter seems to think that under the provisions of the Indian Evidence Act evidence is admissible to corroborate a witness who has not been discredited, and it is against such use of the provision that his criticism is directed. Such, however, is not the wide construction which has been put upon the section by the highest authorities in India. In this particular case it is probable that the Sessions judge rightly admitted

the evidence commented upon. There was a suggestion throughout that the child Golak Mani had been tutored by the police. Could anything be more material than to show that she had made the statement incriminating Muluk Chand before the police appeared on the scene? Then two at least of those so-called corroborative witnesses deposed to her having made this statement immediately after the occurrence and *in the presence of* Muluk Chand.

Dr. Hunter's most important observations are directed against 'the corruption of the police and their determination to support a wrong opinion by tutoring a child in falsehoods to swear away its father's life.' In these observations we fully concur, but at the same time we cannot but regret that a more striking instance of police corruption was not selected for the enlightenment of the British public. Muluk Chand's case has many palliatives, if tampering with truth can be palliated. The child Nekjan met her death at her father's hands. This was a fact; and though Golak Mani was asleep at the time and did not see the circumstances which deprived the mournful accident of all criminality, this fact in all human probability became known to the child-witness at the dawning of the day amid her father's distress of mind and his anxious consultation with the brother-in-law. This fact must strongly have impressed itself on her mind, and an astute police officer could easily have extracted it from her. Then came the positive opinion of the native hospital assistant that it was a case of murder and the cause of death was the injury in the abdomen. That her father had killed Nekjan would be the prominent idea in Golak Mani's mind. How, she did not see, did not know; and Muluk Chand, after the conference with his brother-in-law, doubtless was silent about this. How easy was it to operate upon the child's mind in this state, and supply the further idea of the manner in which the death was caused. The zealous police officer might believe this further idea imported into the child's mind to be a true idea—had not the hospital assistant vouched its truth?—and in his zeal did evil that good might come of it. Here then was false testimony manufactured, and of the most dangerous kind, as containing a large admixture of truth. Muluk Chand withheld the explanation which would have deprived the fact of all criminality. There was nothing to throw doubt on the theory of the police, and they followed the usual procedure of Indian police—they moulded the evidence to their theory. There was no bribery, no money to be gained, no enmity to be satisfied, no revenge to be obtained. The case shows the terrible danger, the awful responsibility of tampering with truth, but it is not a glaring case of police corruption. Indian experience can furnish many much worse instances. We will give one.

Some few years ago an expedition was sent against some border tribes dwelling in the hills, whom it was necessary to punish for raids on British territory. In order to the success of this expedition a large number of men to carry the baggage was absolutely necessary. The inhabitants of the district bordering on the hills, and which formed the base of operations, could not be induced by any wages offered to engage themselves for this service. The success of the expedition was in danger, and the local executive authorities thereupon sent out the police to collect coolies or baggage carriers. In other words, the men were forced to go on this service. From one village in the district most of the adult males were taken away, and a short time after a fresh detachment of police appeared to take the rest. It was strongly objected that the women would be left without protection, and the crops and cattle could not be tended, if the village were denuded of all

the grown-up males. The police, however, were inexorable, whereupon the people resisted, repelling force by force, and the police had to retire discomfited. They soon, however, returned reinforced, and the men who had acted in their own self-defence were prosecuted for resisting the police in the performance of their duty, and sentenced to various heavy terms of imprisonment. It is to be observed that forced labour was abolished by law in India many years ago, and not long since the Secretary of State vetoed an Act of the Indian legislature, because it contained a section empowering the local authorities to compel the peasantry to labour at the repair of certain public embankments, when there was danger of inundation and consequent injury to life and property. The conviction of the villagers for resisting the police was brought before a Court of Appeal, their *zemindar* or local landholder exerting himself to obtain legal assistance. The appellate tribunal held that the police were not acting in the performance of their duty, but were trespassers breaking the law in trying to seize and compel men to work as baggage-carriers against their will, that the villagers were therefore justified in resisting, and not having exceeded the right of private defence had committed no crime. They were accordingly acquitted. To the police, however, it seemed intolerable that their authority should receive such a check, and that they should be so humbled in the eyes of the people of the district. About a year after, the *zemindar* who had exerted himself on behalf of his dependents was charged with coining. After an elaborate trial of some days he was acquitted, it appearing beyond all doubt that the charge was a false one, concocted for the purpose of revenge upon him for the part he had taken in the interest of his tenants. The police had surrounded his house about two o'clock in the morning, and under pretence of searching introduced the coining implements, which were produced at the trial as the strongest evidence against him. This was a bad instance of police corruption. Those also are bad instances in which bribes have been taken in order to let the guilty escape and fasten crime upon the innocent. The Annual Administration Reports furnish other instances every year of cases wholly false or evidence tampered with to the danger of the innocent.

Dr. Hunter remarks that 'the manner in which the High Court in Calcutta discharges its duties has caused it to be regarded with veneration by the people of India as the noblest manifestation of British justice.' It is not very long since the European Head of the Police in Bengal took upon himself to comment upon the action of this tribunal and of the inferior criminal courts in dealing with cases sent up by the police, attributing failures of justice and escape of guilty persons to a too technical application of the law and a too strict adherence to rules of evidence. The Bengal Government unfortunately endorsed these observations, thus bringing about one of those unseemly collisions between the executive and judicial departments of Government which have been of too frequent occurrence in India. Ever since the first establishment of the Supreme Court in Bengal a powerful executive Bureaucracy has manifested an impatient jealousy of independent judicial authority, and has lent itself on too many occasions to disparage the prestige and dignity of Her Majesty's judges in India. On this occasion the tact and good sense of the present Viceroy restored harmony and vindicated the administration of justice. But the origin of the controversy raises a question which is deserving of some consideration. We believe that in a large number of heinous cases, with which more especially the action of the police is concerned, the guilty persons are apprehended and sent up for trial, but are acquitted and escape. The cause of this is not

however to be found in any general technicality in administering the law or in an over-strict adherence to rules of evidence. The rules of evidence in India which regulate admissibility are wider than in England, and local judges err more in admitting what should be rejected than in rejecting what ought to be admitted. The true cause is to be found in the want of skilled preparation of cases for trial. The police have little detective ability, and they do not understand what evidence is legally necessary or admissible. Their mode of procedure is to adopt a theory, not unfrequently a very astute one, and then mould the evidence to support this theory, too often manufacturing a necessary link when it cannot otherwise be supplied. When anything transpires in the course of the trial to raise a suspicion that the evidence has been tampered with, the whole case including the sound portions of the evidence is not uncommonly sacrificed in the minds of judge and jury to this suspicion. Frequently also essential facts, which could have been properly proved by legal evidence if the case had been prepared under skilled supervision, are not proved at all, or are sought to be proved by inadmissible evidence, the result being the escape of criminals who would have been convicted under a sounder system of preparation. Manifestly these failures of justice are due to the action, not of the Courts who can proceed only upon the evidence brought before them, but of those who are charged with the duty of collecting the materials which constitute evidence. This duty is cast mainly upon the police without legal advice or assistance, and beyond question the police are not strong enough for its performance. There is in each district a functionary called the Government Pleader, who undertakes the conduct of Crown cases in the Court of Session. He is not, however, consulted in the preparation of these cases. He receives his brief just before the trial commences, and he has to make the best of the materials sent him by the police and a committing magistrate, too often inexperienced and too often overwhelmed with executive work, upon the doing of which his advancement and promotion mainly depend. The Government of Bengal has had its attention drawn to this unsatisfactory state of things and to the necessity for some reform through which the collection of evidence in serious cases and their preparation for trial may be conducted under proper advice and supervision in the districts. In the Presidency towns, it may be observed, a proper system exists, and the different results of cases there tried furnish one of the strongest arguments for reform in the districts. The Government receives a large surplus revenue from the Courts; and some small portion of this surplus ought to be applied to effect a very necessary improvement in the administration of justice by providing legal assistance and proper supervision in the preparation of Crown cases for trial. If this reform were efficiently carried out, failures of justice would become rare; the police would become more efficient and less corrupt; and cases like that of Muluk Chand would cease to disfigure the annals of the administration of criminal justice in Bengal.

C. D. F.

The Forest of Essex: its History, Laws, and Administration and Ancient Customs, and the Wild Deer which lived in it. By WILLIAM RICHARD FISHER. London: Butterworths. 1887. La. 8vo. viii and 448 pp.

MR. FISHER was one of the Counsel for the Corporation of London in the great suit of *Commissioners of Sewers v. Glass* (L. R. 19 Eq. 134), in which the Commissioners, as owners of some 200 acres of land, part cemetery, part farm, at Wanstead, successfully attacked the inclosures effected by

sixteen lords of manors within the Forest of Epping, and acquiesced in by the Crown, to whom the forest rights belonged. To this suit the book before us owes its origin, and it was desirable that the mass of ancient records collected by the advisers of the Corporation should find some more attractive repository than an old brief. Mr. Fisher's pages bear constant traces of this professional origin. It is natural for the advocate of the Corporation to ascribe the preservation of Epping Forest to 'the exertions and the sole cost of the Corporation,' even though a little before we read that the expense to the Corporation was defrayed out of the grain duty levied on all grain imported into London, and appropriated by Act of Parliament to the exclusive purpose of preservation of open spaces. And documents not capable of being put in evidence in the great suit appear not to have attracted much of Mr. Fisher's attention. He is aware of the existence of the Domesday of St. Paul's, as we gather from one reference, but he gives no other sign that it contains a full and interesting account of the condition of the manors in and near the forest held by St. Paul's in the early part of the thirteenth century. He hardly does justice to the curious change of public opinion in the last century, since the Essex reporter of the Board of Agriculture wrote, 'The forests of Epping and Hainault are viewed as an intolerable nuisance,' to the day when the 'intolerable nuisance' of the forest of Epping has been preserved to the people for ever by statute. He omits to notice that the 'assarts,' or breaking up of forest land for tillage, though offences in the royal forests, are perfectly recognised in other early manors, where the revenues derived from them form an important part of the *Extenta Manerii*. Curiously enough, in the chapter on Pannage he does not deal otherwise than by an indirect reference with the discussion of that obscure subject contained in the case of *Chilton v. Corporation of London* (L. R. 7 Ch. D. 562, 735), in which indeed he was counsel. And perhaps he is a little too leuient on the miserably narrow view of the position and duties of the Crown shown by the Government department responsible for the Crown rights in the Forest, which was all but successful in sacrificing the magnificent open space of to-day to the most petty economy and money-getting.

With these reservations, the author has compiled a very interesting and valuable work. It is hardly so picturesque as the subject would justify. A certain Roger *Deus salvet dominas* lights up a dreary number of names with his quaint appellative, and the chapter on the Forest deer, with the great destruction that fell on them in 1489 when they were 'devoured with swyn and slayn with curres and smeten with arrowes and dede of murreyn' to the number of over 300, is interesting; but one feels that the author might have made a more readable book if his attention had not first been drawn to the matter by his brief. Still to the student of our early institutions these pages will furnish abundant interest. If to old courts the Reeve and four men from each township came, in the forest we find the Reeve and 'his assistants the Fourmen' flourishing in the last century. If in the manor of Domesday we find *bordarii* and *cotarii*, we have in the Forest the 'cottagers' continually appearing, and in the seventeenth century we read of the 'borderers.' If we learn in Mr. Seeborn's pages of the three great open fields of the township, we have to this day the common meads at Waltham in several strips part of the year, some of freehold, some of copyhold tenure, and common to all ratepayers, or to all landowners in the field for the rest of the year. In short, this book provides abundant materials for making the dry bones of past records live, even if its own pages might with advantage have been more enlivening.

T. E. S.

The Law and Practice of Petition of Right under the Petitions of Right Act, 1860. By WALTER CLODE. London: William Clowes & Sons. 1887. 8vo. xi and 264 pp.

THE author in his preface craves a lenient judgment on his work as being the first to deal with this branch of the law; but an examination of it, we think, proves that it stands in need of no special indulgence.

The first three chapters are devoted to the nature and origin of petitions of right; the next nine discuss the various cases in which this remedy is available; while the remainder of the work deals with practice. The Petitions of Right Act of 1860 supplied a new system of procedure so much more convenient than the old that the latter, though in no way repealed, has been in fact superseded by the new. Hence the portion of the work devoted to practice consists chiefly of a commentary on the statute itself. But inasmuch as the Act, while thus providing an alternative procedure, in no respect modified the substantive law, the limits of the remedy must still be sought in precedents ancient and modern, and it is consequently important for the determination of the various questions which may arise to be acquainted with the ancient origin of these petitions.

I. *Nature and Origin of Petitions of Right.*—In the first chapter the author discusses, without attempting to solve, the question of the origin of the petition of right, and presents in a clear tabulated form the evidence in favour of the two rival theories, (i) that by an express enactment of Ed. I it was substituted for an ancient right of action against the Crown; and (ii) that by reason of there never having been a right of action against the Crown, redress of whatever character was of necessity sought by petition. The second chapter traces the history of petitions of right back to the early days when the King in Council performed the functions alike of legislator, executive, and judge; and by numerous citations from the various petitions which have been published in the *Rotuli Parliamentorum* illustrates the classification of petitions which gradually took place as the various departments of state with their special functions were in process of time evolved from the Council. The petitions which remained after the High Court of Parliament, the Exchequer, the various tribunals for the administration of law and equity, and the Privy Council in its several chambers had absorbed those which fell within their respective jurisdictions were denominated Bills of Grace. These remained unchanged; they were still '*baillez au Roy mesmes*'; answered by the King himself in the same terms, and made the subject still of commissions issued to investigate the suppliant's title before being handed over for trial to a court of law,—a genuine relic of the old practice of petition to the King and his Council, deriving its name, as the author with much probability contends, from the ordinary form of royal response endorsed on the petition, '*soit Droit fait als parties*.' There is no more interesting problem in the history of our law than this of the gradual differentiation of that great organ of government known as the King in Council—an interest that is none the less that the investigation is not without a practical bearing on modern theories, although unfortunately many of the details are veiled from us by the mists of ages. Where so much is uncertain it is difficult to arrive at indisputable conclusions on matters of detail; but Mr. Clode has set forth with admirable clearness so much of the old state of things as is necessary for the discussion of practical questions which may depend on the ancient theory and doctrine of this form of remedy.

II. *Where a Petition will lie.*—The author next treats in successive

chapters of the persons to and by whom petitions of right may be sued, and the courts which have jurisdiction to entertain them. Several more are then devoted to a discussion of the various cases in which such petitions will and will not lie, both at common law and in equity. The authorities appear to have been very thoroughly searched from the Year Books down to recent cases reported in the Weekly Notes and the Times newspaper; while the early instances of petitions contained in the Rotuli Parliamentorum and other sources which were not treated as of authority by such fathers of the law as Broke and Fitzherbert and the compilers of the Year Books have been wisely omitted.

The author discusses clearly and with judgment the numerous moot points which the subject presents: such are the questions whether a petition abates by the death of the Sovereign, whether subjects can sue jointly, whether the right of suit is assignable, and whether a petition can be sued where the remedy of Monstrans is available. At p. 52 he adopts with approval, as stating the true doctrine, the opinion expressed by the Court in *Feather v. The Queen*, 6 B. & S. 294, namely, 'that a petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on a violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained.' Yet at p. 63 he says, 'It cannot be too constantly borne in mind that the rights which the subject has against the Crown are entirely different to, and independent of, those which he has against his fellow-subjects; and further, that the test by which it can be decided whether any particular claim of a subject's against the Crown can be maintained is not its legal sufficiency considered as a claim against a subject, but the foundation in precedent which it has considered as a claim against the Crown.' Putting aside cases of the Crown's immunity based (as in the case of torts) on special rules of law, it is difficult to reconcile these two points of view, and if the principle laid down by the author is correct, as in strict theory it probably is, the proposition stated in *Feather v. The Queen*, which is not of a merely negative character, must be regarded as a generalisation expressing not exactly what the law then was, but at any rate what it was desirable that it should be, and what in fact it has continually tended to become.

At p. 164 the author cites and discusses the case of *Irwin v. Grey* (3 F. & F. 635), where a suppliant, to whose petition a fiat had been refused by the Crown on the advice of the Home Secretary, unsuccessfully sued the minister for not 'submitting' the petition to the Crown within the true meaning of the Act. And on the next page the author submits 'that the granting of the "fiat" is a purely voluntary act, and that the Crown cannot be compelled to grant it.' It would, however, have been interesting to have had the author's views on the limits, legal or constitutional, which hedge a minister in submitting or advising upon a petition of right—whether, for instance, he may decline to submit a petition which is 'frivolous and vexatious,' and whether, on the other hand, he can be rendered responsible legally or constitutionally if he refuses to submit or gives erroneous advice upon a petition which is well founded.

In no part of his book does the author better exhibit his thorough comprehension of his subject than in the chapter relating to claims for breaches of contract. His contention is that the decision in *Thomas v. The Queen* (L. R. 10 Q. B. 31), which laid down upon the authority of the Banker's Case (14 State Trials, 1) that a petition of right will lie for a breach of contract resulting in unliquidated damages, was erroneous through misap-

prehension chiefly of Lord Somers' judgment in that case. It is impossible to give here the author's most interesting and able argument, which is necessarily elaborate in proportion to that which it seeks to displace. It is difficult to suppose that a principle which has since been so extensively acted on alike in England and in other parts of the Empire, and which provides a remedy in precisely that class of cases which, as the author points out, appears to have led to the revival of these petitions after 250 years of almost total disuse, will ever be successfully questioned; but the author is none the less successful in convincing us that his criticism is entirely justified by the authorities existing at the time of the decision. Nothing indeed is more striking than the looseness of ideas which appears to have been entertained in regard to many parts of the subject. This is well exposed by the author in his chapter on petitions of right in Equity, in which he shows that prior to the Statute of 1860 there was no authority for a genuine petition of right being sued in Equity. He does not, however, consider the effect of the Judicature Act of 1873 in this connection; yet it is difficult to avoid the conclusion that, however the matter may have stood prior to 1875, the combined effect of secs. 16 and 34 of the Act of 1873, and of sec. 7 of the Petitions of Right Act has been to confer on the Chancery Division a valid title to the jurisdiction it has been in the habit of exercising in this respect.

III. *Procedure*.—The part devoted to practice has been executed with the same skill and completeness as the rest of the work. It consists of a full commentary on the statute in which all the cases are discussed which throw light on matters of procedure. This is followed by the statutory schedule of forms and two appendices containing (i) the Return of all petitions of right presented and filed by Her Majesty under the statute down to 1876, showing in each case the suppliant's name, the subject-matter of the petition and the result of the proceedings; and (ii) the laws regulating proceedings by petitions of right in Ireland, Scotland and certain colonies and dependencies.

We have observed a few errors in printing, comprising one or two mistakes in references, which should be corrected in a subsequent edition. But the book as a whole is an excellent piece of work, and is an example of the way in which one of the most intractable parts of our law can acquire a greatly increased interest by being reduced to clearness and order.

The Principles of Equity: a Treatise on the system of Justice administered in Courts of Chancery. By GEORGE TUCKER BISPHAM. Fourth Edition. Philadelphia, Pa.: Kay & Brother. 1887. 8vo. lxxxvi and 659 pp.

It is a sufficient testimony to the excellence of Professor Bispham's work that his treatise on the Principles of Equity has in thirteen years reached a fourth edition. That a book of this scope and magnitude should attain so wide a popularity speaks well alike for the perspicuity of the writer and the intelligence of the reader. Where the bulk of the work is so good, it may seem ungracious to criticise. But there are some details which would bear amendment, such for instance as the amorphous heading in the index, 'Waltham, John De, erroneously supposed to have invented the subpoena,' and the description of the plaintiff in *Tyrrell v. The Bank of London* (10 H. L. Cas. 28), who was in fact a solicitor, as 'a member of the bar, whose

firm, it had been agreed, were to be employed as the solicitors of the company.' The individual so described would rank as the first of English 'bar-solisters.' We may add, specially referring to pp. 612, 613, that the errors of pen or press are of more frequent occurrence than they ought, in a fourth edition, to be; that the book before us is, as is usual with American law-books, numbered in paragraphs,—a system more convenient to the writer than to the reader; and that, though all the references in the index are to the paragraphs, no indication of such being the case is to be found where it ought to be, at the head of each page of index.

Our present purpose is to notice some of the characteristic features of Equity which are in the United States, but are not in Lincoln's Inn. The limits of the subject are ill-defined. As Lord Hardwicke said in 1745: 'The Court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the Court should be found out.' Nor have the rules of Equity existed, like those of the common law, from time immemorial. In many cases we know, as the late Sir George Jessel said in a famous case, the names of the Chancellors who invented the rules of the Chancery Courts. We can give the date when they were first introduced into Equity Jurisprudence. 'The doctrines are progressive, refined, and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases.' This being so, it is instructive as well as interesting to watch the independent growth of transatlantic Equity. In some States an English tenet is accepted, in others it is rejected. Speaking generally, Professor Bispham states 'that the principles of justice, as administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction, have been adopted in nearly all, it would not be too much to say *all*, of the United States.' It is naturally in smaller matters that we find divergence. The Pennsylvanian Courts refuse to recognise the severance of legal and equitable titles in cases where in England the trust would not be executed, e.g. where there is a mere trust to convey. They treat the legal fee as having passed to the beneficial owner. Again it would seem that in some of the States the position of those men who in England are continually becoming trustees is an enviable one. In New York, Michigan, Louisiana, and Wisconsin, we read, trusts have been abolished except within very narrow limits. All these States, except Louisiana, are chary too in having anything to say to resulting trusts. Once more. In South Carolina, Pennsylvania, and other States the Courts have differed from the English rule, and have decided that a *feme covert* has no power over her separate estate, except that which has been given her by the instrument creating the trust. On the other hand, in nearly all the States, as in England, the doctrine of an equity to a settlement is fast becoming obsolete under the otherwise questionable influence of Married Women's Property Acts. We note in passing a noteworthy decision that a trust 'to secure the passage of laws granting women a right to vote and hold office' is not a charity, and an application *cyprès* of a trust in the same case (*Jackson v. Phillips*, 14 Allen 571) which, coming into effect after the abolition of slavery, sought to provide for the 'preparation and circulation of books and newspapers, the delivery of speeches, lectures, and such other means as in the trustees' judgment will create a public sentiment that will put an end to slavery in this country, and for the benefit of fugitive slaves escaping from the slave-holding States.' Another difference between the law which prevails on either side of the Atlantic is, that in Great Britain, as is well known, the trustee may lose in the management of the trust, but cannot gain, while in

the United States trustees and other fiduciaries are entitled to a reasonable compensation for their services, the amount being in some States fixed by statute, and in others regulated by the Court to which the trustees are liable to account. Turning for a moment to the law of mortgages, in the United States the mortgagor's interest is regarded as being one of a legal, not, as with us, of an equitable character. And to them the doctrine of 'tacking' is happily unknown. So, too, is the rule upon which large encroachments have been made of late years, which laid it down that a voluntary transfer of such property as could not be reached by execution was not fraudulent against creditors. There is a difference too in the construction here and there of the rule which is labelled as that of the Statute 27 Elizabeth, cap. 4. Here it is held that a voluntary conveyance is void as against a subsequent purchaser, even though he may have notice of the same, the theory being that, as the voluntary conveyance is rendered void by the statute, no subsequent purchaser is bound to regard it. There, however, but not uniformly in all the States, a purchaser who has notice of a prior voluntary grant will take subject to the rights of the voluntary grantee. Howbeit the doctrine of notice has never been regarded with favour in the United States. And the Courts of that country have very much, if not altogether, avoided the necessity for marshalling the assets of a deceased by laying down from the first a general rule that 'estates of all kinds, both real and personal, are considered assets for the payment of debts, and that specialty and simple contract creditors stand, as respects both classes of property, upon the same footing.' But marshalling is freely resorted to for the adjustment of the liabilities of living debtors. Concerning the vendor's lien for unpaid purchase money, which was crystallised in England by *Mackreth v. Symmons*, there is a remarkable diversity in the Union. In some States and in the Federal Courts the doctrine has been adopted; in others it has been repudiated; while in a third class, the rule has been abrogated or modified by Statute. Our common mortgages by deposit of title deeds have been sustained, though infrequently, in some States, but they have been disapproved in Kentucky and rejected in Pennsylvania and Ohio. In the law of partnership, again, we find the doctrine of conversion differently applied in England and in the United States. Here the rule is, that where land is bought with partnership funds for partnership purposes, and is in the proper sense of the term an asset of the partnership, it is converted into personalty 'out and out,' not only for the purpose of answering the liabilities of the partnership, but also as between the real and personal representatives of a deceased partner. But almost throughout the Union the rule is, that the conversion is limited to the purposes of the partnership, and *ultra* those purposes the property is treated as if in its original state. That is, the surplus goes to the real representatives of a deceased partner. But in Kentucky the English rule is followed, as it was at one time in Virginia. In the matter of administration we learn from Prof. Bispham that administration actions are of much less importance, and of much less frequent occurrence in his country than in England, as the distribution of such assets is, in most States, vested by Statute in Probate or Orphans' Courts, or similar tribunals. Happy the country, Charles Dickens would have said, which knows no administration action! However, with us they are under the beneficial operation of Order LV of rare occurrence compared with the day which was chronicled or caricatured in *Jarndyce v. Jarndyce*. Lastly, to conclude this *résumé* of some of the salient variations of American from English law as set out by Prof. Bispham, we find a singularity rather of name than of reality in the 'bill to remove a cloud from a title,' which

belongs to the same family as our former bills *quia timet* and bills of peace, the doctrine being capable of assertion 'in almost any case in which justice requires that the title of a party in possession should be quieted, and the evidence of that title is clear.'

The Law of General Average English and Foreign. By RICHARD LOWNDES. Fourth Edition. London: Stevens & Sons. 1888. 8vo. xliii and 696 pp.

IN this edition the text has been increased by about 100 pages, and the body of appendices by about the same number; some fifty fresh cases have been included, of which a few are taken from American reports; but the greater part consist of English decisions given since the last edition in 1878.

Its publication, the author tells us, has been considerably delayed by reason of the long litigation of the cases of *Atwood v. Sellar* (4 Q. B. D. 342 and 5 *ibid.* 286) and *Svensden v. Wallace* (11 Q. B. D. 616, 13 *ibid.* 69, and 10 App. Ca. 404), which for a time had the effect of bringing complete uncertainty over the proper treatment of a question of every-day practice, namely, that of the expenses consequent on putting into a port to repair damages, and at the same time raised doubts as to the true meaning and application of Lawrence J.'s definition (in *Birkley v. Pregrave*, 1 East 220) of general average, hitherto the very keystone of our law on the subject. The author regrets that these cases were not decided in accordance with the views of the dissentient minority of the judges, and especially with the opinion consistently maintained in them by Baggallay L.J. If the very motive of the rule of general average is to encourage the taking of measures tending to the rescue alike of ships, cargoes and lives, surely no encouragement really deserves the name which does not pay the expense in full, including that of putting to sea again! This ground of policy is certainly weighty, and we find accordingly that most of the foreign codes have adopted the broader rule.

The judgment of Lord Esher (Brett M.R.) in *Svensden v. Wallace* as an argument in deductive logic is indeed unanswerable, but the author points out that just as the learned judge held the expenses of discharging the cargo, when necessary to enable the ship to be repaired, to be general average, because they formed a part of the 'going into port to repair,' i.e. of bringing the vessel effectually into a position to be repaired, so it might equally have been held that the charges for reloading, and the pilotage and port-dues on quitting the port, similarly constituted a necessary part of the expense of putting into port to repair, within the true meaning of the rule. In other words, the decision of the Court involved in any case some constructive extension of the natural meaning of the phrase 'going into port to repair,' and both principle and policy would have justified the somewhat wider extension which Baggallay L.J. was in favour of. This is still more apparent if for the above expression he substituted 'putting into port for safety.'

In the last edition the author noted as one of the questions that stood in need of judicial decision the propriety of disallowing as general average the damage caused by voluntary stranding, except when effected in order to extinguish a fire on board. The matter still remains, however, in an unsettled state, and one of the most interesting sections in the book is devoted to a discussion of the subject, and contains an ample collection of the various materials for forming a judgment on the question.

The movement which was commenced some years ago in favour of a uniform system of general average adjustment throughout the maritime world does not appear to have borne all the fruit that was hoped or expected of it. A very considerable degree of uniformity has, however, been attained, as may be seen by referring to the comparative Table of the Laws of General Average prefixed to this work, or to the various extracts from foreign laws and codes set out in the appendices, which have been recast so as to keep pace with the progress of foreign legislation during the last ten years.

General average forms so small a branch of the law, and is moreover so much in the hands of average adjusters, that it cannot be said to be of very wide legal interest. It affords, however, a singular example of the felicitous power of definition of the Roman law, for after studying all the definitions attempted by English lawyers we can agree with the author in doubting whether any one of them 'equals in accuracy and concise fulness the original maxim of the Rhodian law, which in so few words gives the rule, the reason for it, and a typical example;' *si levandae navis gratia jactus mercium factus est, omnium contributione sarcitur quod pro omnibus datum est*.

It may be confidently asserted that whether for the purposes of the adjuster or the lawyer, Mr. Lowndes' work presents (in a style which is a model of clear and graceful English) the most complete store of materials relating to the subject in every particular as well as an excellent exposition of its principles.

A Treatise on the Law of Bailments, including Carriers, Inn-keepers, and Pledge. By JAMES SCHOULER. Second Edition. Boston, Mass.: Little, Brown & Co. 1887. La. 8vo. lviii and 795 pp.

THE first edition of this book did not find a place in our principal law libraries, although we gather from the preface that it was destined to take the place of any further edition of Mr. Justice Story's work. This was perhaps due to the fact that the greater part of its field had been covered by recent books both on negligence and on carriers. The publishers desired, in issuing a new text-book on Bailments, to give particular prominence to the modern law of carriers, which occupied less than one-third of Story's treatise; and accordingly of the present volume more than one-half is devoted to that subject.

To an Englishman's way of thinking the mode of treatment is somewhat too discursive, and so takes a middle course between the two best methods which a text-book can pursue; for while dealing preeminently with principles, it does not attain the conciseness and precision of a digest; and, on the other hand, it does not come to really close quarters with the intricacies of case law.

Though the space allotted to the different parts of the subject varies, as before stated, from that adopted in Story's work, the general arrangement is not otherwise very different. Such differences as there are seem to us to mark a distinct improvement; thus the author has, we think wisely, discarded the Roman terms *depositum* and *mandatum*, and has expressed the divisions of his subject in clear and well-chosen English terms, classing together in Part II all Bailments for the Bailor's sole benefit, in Part III all those for the Bailee's sole benefit.

It is not easy to arrive at an adequate and at the same time simple definition of Bailment. The author adopts the following: 'A delivery of some chattel by one party to another to be held according to the special purpose of the delivery, and to be returned or delivered over when that

special purpose is accomplished ;' but admits that it is not wide enough to embrace all so-called bailments. Perhaps it would be best to confine the term, according to its etymology, to cases where there is a real delivery. It is a violent fiction to call a finder a bailee at all. But if a quite general definition be desired, one might suggest 'the possession by one person of the chattel or goods of another on the terms of mutual obligations imposed by contract or implied by law.'

The author does not lack enthusiasm for his subject. Who shall be heard to talk of the dry bones of the law, when the subject of Common Carriers can raise such a glow of poetic fire as the following? 'This branch of bailment law owes most of its inspiration to the creative genius of modern times; so that, unlike the fabled genie which rose cloud-like from the vase of its mysterious confinement, when a fearless hand broke the seal of Solomon, this once-stified giant of the codes, likewise made free to overspread sea and shore, goes on enlarging in bulk and stature, destined, perhaps, to lose all shapeliness of feature in so immense a mass, yet certain never to re-enter its ancient prison.'

The Law of Railway Companies: being a collection of the Acts and Orders relating to Railway Companies in England and Wales, with Notes of all the Cases decided thereon, and Appendix of Bye-laws and Standing Orders of the House of Commons. Second Edition. By J. H. BALFOUR BROWNE, Q.C., and H. S. THEOBALD. London: Stevens & Sons. 1888. La. 8vo. lv and 916 pp.

THIS book is one which from its form is necessarily characterised by marked merits and by equally marked drawbacks. All the Acts relating to or affecting railways are placed in chronological order, and the judge-made law which has grown up around them is added in the form of notes to particular sections. Economy of space is thus at once gained, as well as great facility of reference, and so the book is one which cannot fail to please the thorough man of business, especially if he is to some extent acquainted with railway law before he finds it necessary to consult this work. But a student who for the first time opened its pages would find before him a legal chaos; because, for one thing, it is wholly impossible to place each of the various points of railway law under a section with which they are logically and closely connected. For example, under s. 89 of the Railway Clauses Act, 1845, which is to the effect that a company is not to be liable to a greater extent than common carriers, are grouped some seventeen pages of notes of cases dealing with all sorts of subjects, such as damages for personal injuries, for breach of contract, contributory negligence, and so forth. This kind of artificial grouping is however clearly inseparable from the character of the book, for, not being a treatise, there can be no systematic arrangement of the materials under carefully thought-out heads. But while this treatment has its drawbacks, it has considerable merits where the subjects fall naturally under some Act, as in the case of rating decisions which can reasonably be grouped under the Union Assessment Committee Act, 1864, which forms a kind of heading for the collection of cases. The treatment of the decisions by the authors is clear and concise—perhaps it may be almost regarded as crude, because there is scarcely sufficient distinction made between important and comparatively trivial cases. Thus the famous decision in *The Bernina*, 12 P. D. 56, which overruled *Armstrong v. The Lancashire & Yorkshire Ry. Co.*, L. R. 10 Ex. 47 and a long course of judicial practice, is disposed of in three lines and a half, though it is based

on clearly-defined principles and has far-reaching consequences. Again, economy of space has sometimes been gained at the expense of clearness of reference. Thus we are told that any interference with an easement appurtenant to land entitles the owner to compensation, and that this has been decided with reference to a private right of way and to an easement of light. Five decisions follow to support the proposition and the examples, but the practitioner is not told which refer to the right of way and which to the easement of light; and so it may be that his time will be wasted in looking through several decisions. But marked as these defects are, they are outweighed by the business merits of the book, which is a valuable one for many practitioners, and many persons engaged about the business of English railways.

The Law of Principal and Agent in Contract and Tort. By WILLIAM EVANS. Second Edition. London: William Maxwell & Son. 1888. 8vo. xxviii and 658 pp.

THE changes effected in this edition call for little comment, the general plan of the work having been retained unaltered. Some eight new sections have been added, and a large number of additional cases, over 500, have been incorporated into the text and notes, with the effect of increasing the former by some sixty-seven pages. New decisions have been carefully discussed where necessary, according to the method adopted in the first edition, and the utility of the book has been greatly increased by being brought down to date.

We miss a few decisions which seem to us of sufficient importance to have merited insertion in their appropriate places, viz. at p. 157, *Gordon v. James* (30 Ch. D. 249), on the authority of a solicitor to receive mortgage money; at p. 181, *Lewis v. Ramsdale* (55 L. T. N. S. 179) on the restriction of a power of attorney in general terms to the special purposes for which it is granted; at pp. 231 and 237, *Barrow & Bros. v. Dyster Nalder & Co.* (13 Q. B. D. 635), and *Hutcheson & Co. v. Eaton & Son* (ibid. 861), on the question when a broker is personally liable on his contract, and what written terms will exclude evidence of custom to render him responsible; at p. 472, *Isaac Cooke & Sons v. Eshelby* (12 App. Ca. 271), on the right of a buyer to set off against the seller a claim available against the seller's agent, a case not only important but open to serious criticism.

Again, the citation of *Maspons y Hermano v. Mildred* at p. 476 should have included the decision in the House of Lords (8 App. Ca. 874), and that of *Re Cape Breton Company* at p. 302 the decision in the Court of Appeal (29 Ch. Div. 795): the report of the case in the House of Lords (12 App. Ca. 652) was no doubt too late for insertion.

We have also noticed some omissions in the table of cases,—omissions the more to be regretted because completeness in this respect enhances the value of a good book.

Wilson's Supreme Court of Judicature Acts, Rules, and Forms, &c. Sixth Edition. By CHARLES BURNEY, M. MUIR MACKENZIE, and C. ARNOLD WHITE. London: Stevens & Sons. 1887. La. 8vo. cvii and 956 pp.

IN our last issue we credited 'Wilson's Judicature Acts,' by a clerical slip, with the citation, on a rough calculation, of 1400 cases only. The number of cases really cited approaches double the estimate we then gave, and is more than half the number cited in 'The Annual Practice.'

We may add to the comments which we made on this pair of works last January that 'Wilson' is admirably adapted for use in the common law courts. We have used it for some time, and we have not found it wanting. It is true that 'Wilson' does not call in aid the mass of cases from the 'Weekly Notes' which the industrious practitioner may have 'noted up' on such an Order as LV or on Order LVIII, r. 15. A Chancery practitioner, accustomed to his 'white book,' may cavil at 'Wilson' for citing too few decisions. But in our judgment there is not always strength in the multitude of cases, and we think that 'Wilson' has nearly approached the medium of safety. It is always easier for a writer who knows of a case to cite it than to summon up the courage which is necessary to leave it out. Among other things that are admirable in 'Wilson' are the yellow edging with which the pages containing the Rules of the Supreme Court, 1883, are differentiated, and the exiguous nature of the 'Addenda and Corrigenda' list, which we are glad to have no wish to expand. We believe that this collection of Rules is an exhaustive one, and we think that this analysis of the 'judge-made' law which has quickly accumulated on the Rules is a sound and an accurate digest.

The Merchandise Marks Act, 1887, with special reference to the important sections, and the Customs, Regulations, and Orders made thereunder, together with the Conventions with Foreign States for protection of Trade Marks. By HOWARD PAYN. London: Stevens & Sons. 1888. 8vo. vii and 132 pp.

THIS is a neat and practical little work. The so-called 'General Introduction,' which would have been more fitly termed an Explanatory Chapter, occupies thirty-two pages, the Act and Notes about the same space, whilst the remainder of the book is occupied by the Appendix. We think that Mr. Pavn's work will be found a clear and useful guide. Thus he points out by way of example how the words 'superfine make' might be an indirect indication of the English origin of a bale of goods, and so cause them to be liable to detention, as being a false 'trade description.' He then shows the need to add, in the event of these or similar words being stamped on goods, a counter statement as to manufacture abroad so as to secure a free entry for the goods in question. We have taken this particular instance because questions arising under the head of false trade descriptions are the most difficult and calculated to give most trouble both to the Custom-house officers and merchants. Except this introductory statement and a few notes to the Act there is no original matter in the book. But this abstemiousness is to be commended, for commentators on Acts are too fond of padding up their books by pointing out, without need, distinctions between the Act under discussion and prior or similar statutes.

La philosophie du droit. Par DIODATA LIOY. Traduit par LOUIS DURAND et précédé d'une préface par LOUIS DURAND et JEAN TERREL. Paris: Chevalier-Marescq & C^{ie}. 1887. cxxxvi and 587 pp.

THIS book had already been translated into German. The French translator has taken advantage of the notes in the German edition, and added original ones of a comparative character. The author moreover has himself revised the translation.

Lioy's work is one of the best which have yet been written upon the subject. It is abreast of modern ideas, research and learning, though the author rather combats than espouses modern views. He is a follower of neither the

utilitarian nor the interest theory. He holds the sources of law to be of a spiritual nature. However, it is one of the merits of the book that the author does not harp much on an independent line of thought of his own. He divides his subject-matter into two parts, the first called 'Objet du droit,' the second 'Sujet du droit,' a division obviously borrowed from the Germans. In the former part, Liouy deals under separate headings with Religion, Science, Art, Industry, Trade, Morality, and Law; in the latter, with the Individual, the Family, the District (Commune), the Province, the State, the Community of States and Humanity. The term Philosophy of Law is perhaps somewhat too limited a title for so wide a subject. Be that as it may, the book is certainly interesting and instructive.

Questions de droit maritime. Par ALFRED DE COURCY. 4^{ème} série.
Paris: F. Pichon. 1888. 8vo. xxi and 481 pp.

THE able manager of the *Compagnie d'assurances générales* expects this volume to be the last of the interesting series, the publication of which he began ten years ago. His essays are upon questions of the day which have fallen within his personal experience, and have no consecutive bearing on each other. Two long chapters of the present volume deal with employers' liability. Another is devoted to exoneration of liability for negligence. One which will be read with interest by Englishmen gives the author's views upon the procedure of our Courts. His strictures on trial by jury in civil causes, and his contrast between our costly safeguards of justice and the more practical and less expensive French procedure, are worthy of the attention of English reformers.

Code de Procédure civile pour l'Empire d'Allemagne. Traduit et annoté par E. GLASSON, E. LEDERLIN and F. R. DARESTE. Paris: Imprimerie Nationale. 1887. xc and 354 pp.

THIS valuable translation by thoroughly competent men, of whom M. Glasson is well known to English jurists, forms one of the series of translations of foreign Codes in course of publication by the Foreign Legislation Commission at the Ministry of Justice in Paris. The historical and analytical introduction and the abounding comparative notes give the work a value quite apart from that which it possesses as an excellent translation. Not the smallest merit of the book is its exhaustive and careful index.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND. Fourth Edition. Oxford: Clarendon Press. 1888. 8vo. xx and 378 pp.

MR. HOLLAND has succeeded in keeping the additional pages of this new edition within a small number. If the book continues to enjoy the well-deserved favour it has hitherto done, the author may yet have hard work to save it from being oppressed by details, and thereby losing some of its merit and convenience as an elementary book of instruction and reference. We would suggest for consideration whether in a future edition the German phrases and extracts might not be reduced. We cannot have an adequate scientific treatment of English law without an adequate English terminology which can be understood without reference to forms of speech cast in the mould of another language. So long as we set before English students such

signs as 'Juristic Act,' so long will they mostly neglect and refuse to believe that the thing signified has any real existence in English law.

A few references to recent cases, given only by date or from newspapers, need posting up; and on p. 170 *Ex parte Gülchrist* is, by one of those vexatious little slips which recent changes in the Law Reports have multiplied, cited as being reported '17 Q. B. 521' instead of '17 Q. B. Div. 521.'

Charitable Trusts: the Jurisdiction of the Charity Commission, being the Acts conferring such Jurisdiction, 1853-1883, with Introductory Essays and Notes on the Sections. By RICHARD EDMUND MITCHESON. London: Stevens & Sons and W. Maxwell & Son. 1887. 8vo. xxxii and 415 pp.

THIS work is what on its title-page it pretends to be. It will be useful to the equity practitioner as giving him the Acts collected together, with references to the cases decided on the various sections. We notice that a case reported in June (*St. Botolph's Estates*, 35 Ch. D. 142) is not mentioned; nor is the Act of last Session, 50 & 51 Vict. c. 49. In other respects we have found this part of the work fairly complete. A very instructive part of the Introduction consists of the history of Charity Commissions in general, and of the present Charity Commission in particular. It appears that the Commissioners perpetually hunger after new powers. One of their favourite ideas is to lay a tax on charities to support their ever-increasing staff—all for the good of the charities, of course. But what would have been said of the Livery Companies if they had proposed to do anything of that kind?

Alphabetical Reference Index to recent and important Maritime Law Decisions. Compiled by ROBERT R. DOUGLAS. London: Stevens & Sons. 1888. 8vo. xvi and 240 pp.

THIS book may be of use to business men, but will be of little use to lawyers. It is described on the title-page as a Reference Index, but it refers to no law or newspaper reports or to any other authority for its versions of the decisions abstracted. As a digest of reported cases it is therefore useless; as an index to the columns of the *Times* and *Shipping Gazette* it may be of use, for the dates of the decisions are given, and apparently it is the reports of these or other newspapers that have been indexed. Occasionally a case is referred to in the Courts of which the only report is in a newspaper, but this rarely happens, and newspaper authorities are of little weight. Some of the decisions summarised by Mr. Douglas are startling: for example, p. 62, that the appearance of a steamer's mast-head light indicates that 'it is that of a steamer whose side-lights are obscured by fog.' Under the head (p. 77) of Compulsory Pilotage is a vague and inadequate summary of the law of pilotage at various ports; 'about,' p. 5, is an odd heading for an Index; and the cross-references (pp. 8, 9, 28, and *passim*) are whole pages in length and altogether excessive.

Attachment of Debts and Receivers by way of equitable execution. Second Edition. By MICHAEL CABABÉ. London: Maxwell & Son. 1888. 8vo. xii and 164 pp.

In this edition of a work on Interpleader and Attachment Mr. Cababé has dropped 'Interpleader' and taken in 'Equitable Execution' as a cognate subject to Attachment of Debts, and we think he has done wisely. Both

subjects are as a general rule neatly and carefully dealt with. But it is not enough to say that 'the provisions of the Common Law Procedure Acts, 1854 and 1860, are *almost identical* with those of Order XLV of the Rules of the Supreme Court, 1883;' the reason for the considerable variations of language between the two sets of provisions (both of which are printed at length) ought surely to have been pointed out. We read with some surprise that a legacy is not attachable (*M'Dowall v. Hollister*, 3 C. L. R. 933; 25 L. T. O. S. 185), and think it should have been stated whether or not, looking to the fact that since the Judicature Acts an equitable debt is attachable (see *In re Cowan's Estate*, L. R. 14 Ch. D. 638), this would still hold good. Equitable execution is dealt with more shortly, but with more and better original writing, and there is a short collection of forms, one or two of which are original. There is the doubtful convenience of a double index, one to each part of the work, and the few 'statutes cited' are given in each index instead of being placed in a 'table of statutes' at the beginning of the book in the usual and more convenient fashion. Lastly, we must complain that only one set of reports (the Law Reports) is referred to.

A Treatise of the Law and Practice relating to Vendors and Purchasers of Real Estate. By the late J. HENRY DART. Sixth Edition. By WILLIAM BARBER, Q.C., R. B. HALDANE, and W. R. SHELDON. 2 vols. London: Stevens & Sons. 1888. La. 8vo. ccciv and 1669 pp.

MANY members of both the branches of the legal profession will be glad to hear that the new edition of this well-known and highly-appreciated work has at length been published. It has been long in preparation, and the extensive changes and numerous improvements which have been introduced are the result of assiduous labour combined with critical acumen, sound knowledge, and practical experience. The popularity of the treatise is too well established to stand in any need of commendation; but it is probable that on a future occasion we shall give some further account of the special features upon which the present edition relies for enlarging, if possible, the wide circulation of its predecessors.

We have also received:—

Le Droit de la Guerre. Par le Professeur EMILE ACOLLAS. Paris: Delagrave. 1888. 12mo. 166 pp.—This is a neat little handbook, but contains rather more of purely individual speculation than seems desirable in a work of elementary instruction. The author has a strong opinion that no State is entitled, under any circumstances, to cede any part of its territory without the consent of the inhabitants; and on the other hand, that any and every section of a State (*la commune, le canton, la province*) has an absolute natural right of secession. This may be arguable, but it is not the general opinion of publicists. Bluntschli is often referred to, seldom with assent, and sometimes with dissent only just within the bounds of literary comity.

Precedents of Deeds of Arrangement between Debtors and Creditors, with Introductory Chapters; also the Deeds of Arrangement Act, 1887. By GEORGE WOODFORD LAWRENCE. Third Edition. London: Stevens & Sons. 1888. 8vo. viii and 142 pp.—Since the last edition of this work the Deeds of Arrangement Act, 1887, has materially affected the subject of this treatise; and the author has now duly set out the Act, together with some notes and with the consequent new rules and orders. In a short time—possibly

within a few months—we may be able to know something of the practical working of the new statute and to estimate the effect which it will have on arrangements outside the Bankruptcy Law. The Act is very stringently drawn, and the author expressly disclaims any attempt to drive the proverbial coach-and-four through it.

Histoire de la vallée et du prieuré de Chamonix du X^e au XVIII^e siècle. Par ANDRÉ PERRIN. Chambéry, 1887. La. 8vo. 256 pp.—This work is complementary to the collection of documents lately published, and will make it more generally known that Chamonix was not an undiscovered wilderness down to the middle of the 18th century, but on the contrary was a place with a good deal of history. We have here many interesting details of mediæval franchises and jurisdictions. The men of Chamonix stoutly and successfully maintained their privileges in the matter of criminal justice, and their administration of it seems to have been relatively enlightened and humane. They did burn heretics and witches now and then, but at worst not more than respectable public opinion absolutely required.

Manual of the Coal Mines Regulation Act, 1887. Containing Act, Notes, References, Forms, and Copious Index. By JOHN C. CHISHOLM, Secretary to the Mid- and East-Lothian Coalmasters' Association. Revised by Counsel in England and Scotland. London: Stevens & Sons. 1888. 8vo. xvi and 219 pp.—We have no skill to 'ventilate the workings on the annexed diagram of a fiery mine,' or to 'describe fully the process of blasting in a sinking pit;' in short, this is a book for mine-owners and miners more than for lawyers; but it looks as if the proper things were in it and conveniently arranged.

Benjamin's Treatise on the Law of Sale of Personal Property: with references to the American Decisions and to the French Code and Civil Law. By J. P. BENJAMIN, Q.C. From the latest English Edition, with American Notes, entirely re-written by EDMUND H. BENNETT. Boston, Mass.: Houghton, Mifflin & Co. 1888. La. 8vo. xii and 1010 pp.

A Sketch of the Land Transfer Bill, 1887. By W. H. B. ATKINSON. London: Stevens & Sons. 1888. 8vo. 12 pp.—Having regard to the production of a new and materially revised Land Transfer Bill, we fear this pamphlet is wanting in what the French call *actualité*.

La philosophie religieuse en Angleterre depuis Locke jusqu'à nos jours. By LUDOVIC CARRAN. Paris: Félix Alcan. 1888. 294 pp.—A careful study of contemporary Anglo-Saxon philosophy from the *spiritualists* point of view. *Ceterum non est de nostra facultate.*

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as afore-said, cannot be in any way answerable for MSS. so sent.

THE Solicitor-General's unexpected, not to say startling, utterance on the relations of the two branches of the legal profession in England has naturally raised much curiosity and comment. We are inclined to think, however, that whatever movement exists among either barristers or solicitors in favour of so-called 'fusion' is at present a superficial one. At present we make only the following very short observations.

1. A real fusion, in the sense of having either only one qualification for legal practice, or, as in some of our colonies, a double qualification of which a lawyer may take and use in practice either or both branches at his choice, might possibly be a good thing; at all events we cannot say offhand that it would be a bad thing. But to carry it out would require a thorough revision of the existing plan of legal education, and therein of the relations between the Inns of Court and the Incorporated Law Society.

2. If barristers were allowed to do certain parts of solicitors' work, and solicitors to do certain parts of barristers', some benefit would no doubt ensue to some practitioners. We doubt if there would be much gain to the public. As it is, a barrister's powers of seeing clients without the intervention of a solicitor, which are a good deal wider than most people know, are not used to anything like their full extent.

3. In any case we do not believe that law could or would be made materially cheaper to the lay public by any readjustment of the existing division of work. In a community like ours legal work is and must be highly specialized, and the work of the specialist will command its value.

F. P.

The Canada Law Journal is offended by our application of the epithet 'pirated' to the Blackstone Publishing Company's reprints of English text-books. We used it with full deliberation, and do not mean to enter into any discussion of the propriety of language which is already amply justified by the usage of leading men of letters, and lawyers too, not only in England but in the United States. One of the most learned and best known American text-writers, Mr. Bishop, has quite lately applied the horrible word 'piracy' to proceedings far short of absolute reproduction: see his article in the January—February number of the American Law Review. Moreover the 'national sin of literary piracy' has lately been denounced from the pulpit in New York. We do not mean to say that every non-copyright reprint should be called a piracy; but this is not the occasion to mention the exceptions.

The new Land Transfer Bill cannot be discussed in this number. In form it shows a great improvement on its predecessor of last year; it has dropped the obscure and vexatious method of legislation by minute cross reference, and has become a revised edition of Lord Cairns' Act of 1875,

having regard to the Settled Land Acts, and consolidated with the new scheme of registration. Whatever may be the final judgment of Parliament and the profession, we have to thank the draftsmen for giving us this time the means of criticising their work in the light. From such rumours as have yet reached us we do not think the substance of it will escape criticism.

NATURALISATION.—IN RE BOURGOISE (INFANTS).

The decision given in this case by Mr. Justice Kay on the 12th January last (4 Times Rep. 195) involves questions of considerable importance connected with the naturalisation of Frenchmen in England. Judging from the only reports yet published it appears to me that the judgment itself and the evidence upon which it was based are apt to mislead the public.

The case was shortly as follows: M. Bourgoise, a Frenchman, obtained in 1871 a certificate of naturalisation under the Naturalisation Act, 1870. In 1879 he returned to France, where he resided until he died, leaving a widow and two children. On the death of his widow the family council appointed the maternal grandmother their guardian, and Mr. Johns, their half-brother, an Englishman, was appointed the *subrogé-tuteur*, who is a counter-guardian to represent the interests of the children as against those of the guardian, and not a deputy-guardian as erroneously stated in the case. An application was made on summons by the infants appearing by Mr. Johns as their next friend for his appointment as their guardian. The question was, whether the Court had jurisdiction to entertain the application. Affidavits by French lawyers were read; one of these, filed no doubt on behalf of the French guardian, stated that the proviso inserted in the certificate of naturalisation, viz. that the naturalised subject, while thereunder acquiring all the rights of a natural-born British subject, 'shall not when within the limits of the foreign state of which he was a subject previously to his obtaining his certificate of naturalisation be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect,' rendered naturalisation only partial and incomplete, and did not deprive a Frenchman of his nationality. This affidavit is reported to have further stated that such a qualified naturalisation was looked upon in France as conferring little more than the rights which a foreigner could acquire there under Art. 13 of the Civil Code providing as follows:—'A foreigner who shall have been admitted by authority (of the Emperor, King, or President) to establish his domicile in France shall enjoy there all civil rights so long as he shall continue to reside there,' and that such a grant did not effect nationality. It stated, moreover, that under the decree of 26th August, 1811, no Frenchman could be naturalised in a foreign country without government assent. The other affidavit, filed no doubt on behalf of the applicants, stated that the case was governed by Art. 17 of the Civil Code, which says, '*La qualité de français se perdra par la naturalisation acquise en pays étranger*,' that the decree of 1811 did not conflict with this article, and that in any case 'the decree was illegal as having been made in excess of the Emperor's powers.'

Mr. Justice Kay gave his judgment in the sense of the former of these affidavits on the grounds that a certificate of naturalisation with the proviso above-mentioned is not a certificate of naturalisation absolutely to all intents and purposes, but produced its effects only so long as the subject of it did not reside in the country of his birth, unless by the law of that country, viz.

France, this certificate made him cease to be a French subject to all intents and purposes, and that it appeared that he did not under a qualified certificate cease to be a French subject; that moreover Bourgoise did not obtain the state assent requisite under the decree of 1811. The following propositions in the judgment and evidence on which it was founded can, I think, be challenged:—

1. That a certificate of naturalisation in the terms in question is a qualified naturalisation;

2. That such a certificate of naturalisation does not deprive a Frenchman of his nationality; in other words, that the decree of 1811 renders permission of the French government an imperative condition of valid naturalisation abroad.

1. Mr. Justice Kay asked whether naturalisation for a year would deprive a Frenchman of his French nationality, as a *reductio ad absurdum* of the contention that Art. 17 of the Civil Code applied even where the naturalisation was not an absolute one. The answer to this query must no doubt be in the negative; but whether such a qualified naturalisation as this and naturalisation with the proviso in question are to be considered as on the same footing may be disputed. The Act of 1870 says: 'An alien to whom a certificate of naturalisation is granted shall in the United Kingdom be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect' (Art. 7). Does this proviso in the Act of 1870 operate as an absolute restriction of the effects of the naturalisation? It says the naturalisation shall be absolute unless (and excepting) the state to which the subject previously belonged does not acknowledge it and regards him as still owing it allegiance. If that state does acknowledge it, the naturalisation is absolute. The Act does not qualify the naturalisation, but leaves it to the previous state of the naturalised subject within its own boundaries, and within them only, to qualify it or not as the case may be. It says to the naturalised subject: 'You shall have all the rights of a British subject under this naturalisation, but beware that if your present state does not absolve you from allegiance to it, this country will not step in between you and it.' The proviso in question is merely a consecration of the right of independence of states, of the principle that no state has a right to impose the recognition of its domestic laws or views on another state, or to interfere with another state in the application of its domestic laws to those from whom it claims allegiance.

The proviso of the Naturalisation Act, described as a qualification, is now so universally admitted that it may be said that no other naturalisation exists. Phillimore, writing long before the Act of 1870, said, 'The naturalised person is supposed for the purposes of protection and allegiance at least to be incorporated with the naturalising country.' 'This proposition,' he added, however, 'must admit of one qualification similar to that already mentioned with respect to the domiciled subject, if the naturalised person should have been the original subject of a country which did not allow him to shake off the allegiance (*exuere patriam*). In this event, if he should find himself placed in a situation—the breaking out of war for instance—in which his duties to the country of his birth and of his adoption are at variance, the former country would not regard him as a lawful enemy, but

as a rebel, nor could the *jus avocandi* already spoken of be legally denied to her by the adopting or naturalising country, though the enforcement of the right could not be claimed' (Vol. I. p. 349)¹.

'Every state,' says Phillimore elsewhere, speaking of emigration, 'has an undoubted claim upon the service of all its citizens. Every state has strictly speaking a right of prohibiting their egress from their own country, a right still exercised by some of the continental powers of Europe. These rights are subject to no control or directions as to their exercise from any foreign state' (p. 346)².

The same principle was particularly well indicated from another standpoint by Mr. Marcy in instructions as Secretary of State to Mr. Daniel in 1855 (Nov. 10). 'This Government,' said Mr. Marcy, 'cannot rightfully interpose to relieve a naturalised citizen from the duties or penalties which the laws of his native country may impose upon him on his voluntary return within its limits. When a foreigner is naturalised the government does not regard the obligations he has incurred elsewhere, nor does it undertake to exempt him from their performance. He is admitted to the privileges of a citizen in this country, and to the rights which our treaties and the law of nations secure to American citizens abroad. In this respect he has all the rights of a native-born citizen; but the vindication of none of these rights can require or authorise an interference on his behalf with the fair application to him of the municipal laws of his native country when he voluntarily subjects himself to their control in the same manner and to the same extent as they would apply if he had never left that country. A different view of the duties of this government would be an invasion of the independence of nations, and could not fail to be productive of discord.'

'L'unique chose,' says Fiore, 'qu'on ait le droit d'exiger c'est que le citoyen n'abandonne pas sa patrie avant de s'être préalablement acquitté de ses devoirs envers elle. Aussi on admet généralement que le citoyen ne peut pas renoncer à sa nationalité avant d'avoir accompli son service militaire et qu'on peut traiter comme traître celui qui a porté les armes contre sa patrie' (Nouveau droit international public, 1885. Vol. I. p. 412).

Mr. W. E. Hall sums up modern practice on this point in the following terms:— 'A state has necessarily the right in virtue of its territorial jurisdiction of conferring such privileges as it may choose to grant upon foreigners residing within it. It may therefore admit them to the status of subjects or citizens. But it is evident that the effects of such admission in so far as they flow from the territorial rights of a state make themselves felt only within the state territory.' (International Law, p. 107; see also Stoerck in Holtzendorff's *Handbuch des Völkerrechts*, Vol. II. p. 599; Pradier-Fodéré, *Droit International Public*, Vol. III. p. 693; Bar, *Internationales Privat- und Strafrecht*, p. 98.) Hence the qualification of section 7 of the Act of 1870 is a mere legislative acknowledgment of a restriction which is a natural consequence of the principles of the law of nations recognised in the general practice of states. It would exist, whether it had figured in the Act of 1870 or not, as a matter of public policy.

A certificate of naturalisation under the Act of 1870, I therefore venture to submit, is as absolute as any state can make it without invading the independence of other states.

2. As regards the points of French law, the judgment stated that the British certificate did not deprive a Frenchman of his nationality, (a) because the naturalisation in question conferred little more than the rights which a

¹ [This passage stands unaltered in the 3rd ed. 1879, p. 447.]

² [444 in 3rd ed. 1879.]

foreigner could acquire in France under Art. 13 of the Code Napoléon, and (b) because the decree of 1811 provided that no Frenchman could be naturalised in a foreign country without the authority of the government.

The comparison made between the *admission à domicile* under Art. 13 of the Civil Code, which grants no political rights whatsoever, and naturalisation under the Act of 1870, is founded on a misapprehension. It is evident that letters of denization, not a certificate of naturalisation, are what must have been running in the mind of the legal witness whose opinion the Judge adopted. The French Courts have certainly several times decided (Cassation, 29th Aug. 1822; Paris, Appeal, 27th July, 1859) that letters of denization do not fall within the sense of the word 'acquise' in Art. 17 of the Civil Code; but never to my knowledge that a certificate of naturalisation before or after the Act of 1870 was to be treated in the same way.

As regards the decree of 1811, the contention that it was illegal has little or no practical importance in the case in point. The decree may be unconstitutional, but it was not annulled, it has never been repealed, it has been applied by the Courts, it is still considered in force at the Ministries of Justice and Foreign Affairs, and the chief writers of authority, such as Aubry et Rau (Cours de droit civil français, Vol. I. p. 267), Cogordan (Nationalité, p. 160), de Folleville (Naturalisation, p. 308), are agreed as to its being enforceable. I may mention that its repeal is provided for in the Naturalisation Bill now before the Chamber of Deputies.

That the decree makes the permission of the French Government requisite to bring naturalisation abroad under the application of Art. 17 of the Civil Code, however, is quite incorrect.

The first article of the decree of 1811 taken alone would certainly warrant the supposition that the decree prevented naturalisation abroad, and that a person would still remain a French subject, as found by Mr. Justice Kay, unless expressly 'denationalised,' but the context does not bear out such a construction. The other articles provide penalties for naturalisation abroad and forfeitures. Of these one is still enforceable, under which a naturalisation without permission by the French Government entails incapacity to succeed to property in France¹. The preamble, moreover, purports to deal with the 'abandonment of French nationality from a political standpoint.' The decree in fact provides penalties for deserting the mother country, but it does not repeal Art. 17 of the Civil Code, nor am I cognisant of any work or decision of authority which has taken the view that it did so. The following passage is from an eminently practical work (Cogordan, cited above):—'Il semble que dès lors' [after quoting Art. 1 of the Decree of 1811] 'le français qui s'est naturalisé sans autorisation ne doit pas être reconnu comme étranger par la loi française et par suite continue d'être traité en France comme français, mais telle n'a pas été la pensée des rédacteurs du décret. Dans la suite on parle d'individus naturalisés étrangers sans autorisation et il est facile de voir qu'autorisé ou non, le français est toujours dénationalisé, comme sous le régime du Code Civil; mais celui qui n'a pas reçu l'autorisation de l'Empereur est frappé de graves déchéances... Ajoutons que ces décrets sont aujourd'hui surtout un épouvantail destiné à effrayer; en pratique ils ne sont guère appliqués et un grand nombre de français n'hésitent pas à se faire naturaliser à l'étranger sans avoir obtenu l'autorisation du gouvernement, laquelle coûte 675 francs et protège contre des dangers plus apparents que réels.' (Nationalité, p. 160, et seq. See

¹ All foreigners without distinction were under this same disability at the time when the decree was issued.

also M. de Folleville, *Naturalisation*, p. 306, whose statement in the same sense is equally precise.)

Among the cases in which the Courts have decided as above stated may be cited the Zeiter case at Wissembourg in 1860; another at Colmar, 19th May, 1867 (Osterman's case), which might be called the leading one on the subject, and other cases such as Disforet's case at Lille (30th September, 1879), in which the decree could have been but was not invoked.

There is another point in Mr. Justice Kay's judgment connected with the ground on which he declined jurisdiction, but this would raise the whole question of nationality *versus* domicile, and as the subject does not appear to have been broached in the case in point, I leave it alone for the present.

THOMAS BARCLAY.

Regard being had to the well-known doubt as to the right of the lord of a manor in days before the Statute of Merton to inclose land which was subject to rights of common, a doubt which has been recently discussed by Mr. Scrutton, the following entry on a plea roll of 1221 (*Coram Rege Roll*, Hen. III, No. 14, m. 31) may be read with interest. It occurs among a number of memoranda which seem to have been made by justices holding an eyre in the western counties. These memoranda have as their heading '*Loquendum de hiis*,' which probably means that the underwritten matters are to be brought to the notice either of the Justices of the Bench or of the King's Council. The first concerns a purpresture perpetrated by Llewelin. The fourth is this:—*De illis qui habent magnas terras et non possunt essartare de terra sua vel pastura pro illis qui habent j virgatam terre cum sufficienter habere poterunt communam.*

It seems to be thought a grievance that an inclosure may be stopped by a person who has but a single virgate of land and who after the inclosure will still have ample pasture.

F. W. M.

Every quarter that passes adds to the number of the decisions on the so-called conflict of laws. This is no accident. The complexity of modern commerce, the prevailing habit of travel, the constant inter-communication between the inhabitants of different countries necessarily produce cases which depend for decision upon the effect to be given by English courts to the rules of foreign law, and it is in the main a thing to be thankful for that a department of law which has been created during little more than a century is the work of judicial and not of Parliamentary legislation. The recent Law Reports contain at least three cases interesting to every student of the topic conveniently, though with admitted inaccuracy, termed private international law.

Société Générale de Paris v. Dreyfus Brothers, 37 Ch. Div. 215, determines two points of considerable importance. The first is, that the right of a plaintiff to issue a writ for service out of England is subject to the discretion of the Court, that it is not enough for him to show that his case comes within Order XI, r. 1, but that he may also be called upon to satisfy the Court that he has a probable cause of action. The second is, that where the cause of action depends upon the law of a foreign country, e.g. France, the decision of French Courts as to the rights of parties being French subjects and domiciled in France, concerning the matter in dispute will be held decisive by English Courts.

Nouvion v. Freeman, 37 Ch. Div. 244. The Court of Appeal has in this instance reversed the decision of North J. giving effect in England to

a Spanish judgment. It is, however, to be noted that the Court of first instance and the Court of Appeal are agreed in principle. They both hold that the 'final' judgment given by a court of competent jurisdiction in Spain can be enforced by action in England. The difference between the Court below and the Court of Appeal depends upon the different view they take as to the nature of the Spanish judgment sought to be enforced. North J. held that a '*remate*' judgment was a 'final' judgment, in the sense in which the term 'final' is used by English lawyers. The Court of Appeal holds that a '*remate*' judgment is not a final judgment. The nature of a foreign law being a question of fact, the difference between Justice North and the Superior Court is in reality a difference of opinion as to the facts of the case. It is worth noting that Cotton L.J. reiterates in most distinct terms the principle affirmed in *Godard v. Gray* (L. R. 6 Q. B. 139), that a foreign judgment, otherwise valid, will not be invalidated by the fact that the Court delivering it takes an erroneous view of English law.

D is a natural-born British subject, born in England during the year 1792. In 1816 he leaves England and never returns there. Somewhere about 1820 he settles at Naples, and about that date forms a connection—whether of marriage or not is disputed—with *C*, a Neapolitan woman. *A*, the son of *C* and *D*, is born at Naples on the 8th of March, 1821. Soon after this *D* and *C* cease to live together. In 1829 *D* takes up his residence at Lausanne, in Switzerland, and lives there with *A* till 1840, when *A* goes to Hamburg. In 1840 *D* marries *S*. In 1842 *D* is admitted a citizen of the Commune of Riesbach, in the Canton of Zürich. A few months later the governing Council of Zürich grant *D* naturalisation in the Canton, and sanction his citizenship in the Commune of Riesbach. In June, 1853, *D* is divorced from *S*. He then goes to reside in Savoy, at that time part of the Sardinian Kingdom, but in 1859 ceded to France. *D* continues to reside in Savoy till his death in 1878, and dies domiciled in France. According to French law the right of succession to the movable estate of a foreigner, as was *D*, is governed by the law of his nationality. Under a treaty between France and Switzerland the rights of parties claiming to share the estate of a Swiss subject dying domiciled in France, are to be determined according to the law and by the tribunals of Switzerland. *D* leaves all his property by will to *X*, without making any mention of his son *A*. Lengthy litigation takes place between 1879 and 1887 in Zürich with regard to the respective claims of *A* and *X* to *D*'s property. The ultimate result of the proceedings in Switzerland is, that *A* is declared the legitimate son of *D*, and entitled as such to nine-tenths of *D*'s property; and in giving this decision the Zürich Court goes upon the principle that the family rights of *A* are to be decided according to English law, and that according to English law *A* is under the circumstances of the case to be presumed legitimate. An action is brought by *A* against *X* in England to have the Swiss judgment enforced and for a declaration that *D* died in France, a Swiss subject, and that his property ought to be administered in accordance with the law of France.

These are the circumstances (omitting immaterial complications) under which Justice Stirling was called upon in *Trafford v. Blanc* (36 Ch. D. 600) to determine the claim of *A*, *D*'s son, to his father's property. It might well have been imagined that *D* had purposely spent his life so as to raise at his death the greatest number possible of nice points with regard to the conflict of laws. The only point not in dispute was *D*'s domicile. This was admittedly French. Was *D*'s marriage valid? Did he ever become a Swiss

citizen? What was the effect on his citizenship of the Naturalisation Act, 1870? What was the law in accordance with which *D*'s property ought to be distributed? Had the Swiss Courts taken a right view of the law of England with regard to the proof of legitimacy? If not, how far, if at all, did their error affect the validity in England of the Swiss judgment? These were a few of the inquiries submitted to the English judge.

His answer in substance was that, as *D* died domiciled in France, *A*'s rights must be determined according to the law of France, i.e. in the way in which a French Court would determine them. *D*, however, was, in the opinion of Justice Stirling, a Swiss citizen. The law of France is that succession to the property of Swiss citizens shall be determined according to Swiss law. On the matter of Swiss law the decision of the Swiss Courts was decisive. The consequence therefore followed that the Swiss judgment was valid, and that *A* is entitled to nine-tenths of *D*'s movable property.

The judgment is elaborate and interesting. Several of the points decided by it are, it is submitted, clearly right. It is clear that the succession to *D* ought to be distributed according to the law of France, i.e. according to the rules (in this instance the principles of Swiss law) which a French Court would in the particular case follow. It is further clear that the decision of the Swiss Courts ought to be decisive as to Swiss law; and, on the authority of decided cases, it is lastly clear that an error on the part of the Swiss Courts as to the law of England does not invalidate their judgment when brought before an English Court. What is not, however, quite clear, is that Justice Stirling was right in holding *D* to have been a Swiss citizen. It is not quite apparent whether the Swiss Courts, or, what under the circumstances is more important, whether any French Court determined this point. Considering the differing opinions of Swiss lawyers, and the nature of the case, it is at least doubtful whether *D*, though he became a citizen of Zürich, ever became a Swiss subject. Whatever be the right view as to an obscure question of Swiss law, the problem presented is one which can hardly be satisfactorily solved by any English Judge.

The result reached by Justice Stirling was, it is highly probable, right. An inquiry, however, of some practical as well as theoretical importance remains open. Would it not have been better had the English Court followed out to the end the principle that the decision of the right to the succession to *D* depends on the law of *D*'s domicile? The natural result of this principle would seem to be that *A* should first establish his right to *D*'s property in the French Courts, and then, having done this, apply to the English Courts to carry out the French judgment. In other words, there is extreme inconvenience in holding that, while a person claiming the property of a deceased must establish his rights under the law of the deceased's domicile, the claimant need not resort to the Courts of the domicile, and it is to be regretted that English decisions have not established that, as a general rule, the Courts of a man's domicile are the proper tribunals to determine what is the law of his domicile.

In the case of *Trafford v. Blanc*, Justice Stirling was called upon to decide intricate questions of law. In the so-called 'Baralong Marriage Case,' see 4 Times L. Reps. 317, he had to deal with a question of law which run very near to a question of ethics. An Englishman settled in Africa married a woman of the Baralong tribe in accordance with the customs of an uncivilised race. The law of the tribe allows both polygamy and divorce at will. Mr. Bethell, the so-called husband, might have married according to the rites of the Church of England. He did not do so apparently, just because he did not wish to form any closer tie

than that known as marriage among his wife's tribe's people. The provisions of his will further showed a conclusive intention to deal fairly with her and her children in accordance with tribal notions, but almost negated the idea that he meant the woman to occupy the position of a Christian wife. On Bethell's death in a skirmish with the Boers, the question arose whether his child by the barbarian wife was a legitimate son entitled to inherit his father's property under the law of England, or, in other words, whether the connection with the Baralong woman was according to English law a 'marriage.' Justice Stirling held that it was not. His judgment has been blamed by critics who know little of law. With *Hyde v. Hyde* (L. R. 1 P. & D. 130) before him he could have come to no other decision. It must be added that the Baralong case goes a good way to show that the decision in *Hyde v. Hyde* was just. On any view it is idle to talk of these decisions as specially grievances to women. In *Hyde v. Hyde* the sufferer was the husband.

A legal theorist sometimes wonders whether the judges who issued the Rules of Court, 1883, Order XI, were aware that they were raising questions as to the nature and locality of obligations to which English Courts have been little accustomed. That this was the effect of rules determined in the main by considerations of practical convenience becomes clearer every day. Thus *Kaye v. Sutherland* (20 Q. B. D. 147) turns on the inquiry whether, when a tenant of a farm in Yorkshire sues a landlord resident in Scotland for compensation for tenant right according to the custom of the country, the contract sought to be enforced is a 'contract, obligation, or liability affecting land.' The Court determined that it was, but it is impossible not to see that the case is one of a good deal of speculative difficulty. *Robey & Co. v. The Snaefell Mining Co.* (20 Q. B. D. 152) also illustrates the point on which we are insisting: A, an engine-maker in England, sues X & Co., a company carrying on business in the Isle of Man, for the price of machinery set up by A for X & Co. in Man. The right to issue a writ out of England depends on the question whether the 'contract' was to be 'performed' in England. It is held by Stephen J. that the contract sued upon was to be performed in England, because the proper place of payment was Lincoln, where A carries on his business. There is a great deal to be said for the decision, but it is certainly open to criticism. The 'contract,' taken as a whole, was a contract to be performed by A in Man, and by X in England. Can it be said that such a contract is 'a contract to be performed within the jurisdiction,' i.e. in England? It was either a contract to be performed partly in England and partly out of England, or else it must be regarded as in effect two contracts. This, it may be suspected, was the view substantially taken by the Judge. It is in itself tenable, but it is not exactly in conformity with the ordinary language of English law, under which a bilateral contract is generally spoken of as one contract.

Oddly enough, 'practice,' though in itself an uninteresting topic, is a branch of law which more often than any other gives rise to curious speculative questions. *Pilloy v. Robinson* (20 Q. B. D. 155), for example, deals with as dry a subject as can be mentioned, namely, the joinder of parties. But it in reality raises an interesting question of right as to the joint liability of co-contractors. The case decides in effect that one of several contractors has a right to have his co-contractors joined in an action against him. This is an almost inevitable deduction from the principle maintained in *Kendall v. Hamilton* (4 App. Cas. 504). The case also illustrates another fact which

is often overlooked, namely, that a good deal of the old system of pleading rested so firmly on the principles of the Common Law, and indeed on the maxims of common sense, that changes in the form or nomenclature of our system of procedure do not really change its substance. The Writ of Abatement may in name be abolished, but in reality it survives; and a defendant has still the right to plead to non-joinder of his co-defendants.

In re Gardiner, 20 Q. B. D. 249, is a further illustration of the anomalies of the Married Women's Property Act, 1882. That case decides, and apparently on good grounds, that a married woman possessed of separate estate, but not carrying on a trade separately from her husband, is not subject to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under the Bankruptcy Act, 1883, sec. 4. In other words, a married woman is, as we have often pointed out, not in reality liable for breach of contract. Piecemeal and unscientific legislation has led to the result that a married woman has the capacity to contract without sharing the liabilities of other contractors. If anyone doubts the truth of this assertion let him compare *In re Gardiner* with *Scott v. Morley*, 20 Q. B. Div. 120, on which we commented in a former number.

Matthews v. Munster, 20 Q. B. Div. 141, is a case which, though rightly decided, may, it is probable, excite the disapprobation of laymen. The Court in effect determine that a counsel has authority, in the absence of his client, to settle the case even when the action is one of malicious prosecution involving questions of character, and even though the client on hearing of the compromise repudiates it. The judgment of the Court is, however, quite defensible. Our whole system of trial depends on the supposition generally well warranted by the facts, that confidence can be placed in the integrity of counsel, and no one who has observed a party conducting his own case can fail to see that clients on the whole gain greatly by leaving their interests in the hands of a trained, and more or less dispassionate representative. Any decision which materially limited a counsel's authority would, on the whole, prevent the attainment of what ought to be the object of every trial—the fair settlement of the question in dispute.

Crampton v. Ridley & Co., 20 Q. B. D. 48, curiously illustrates a point which has not received as much notice as it deserves, namely, the way in which the principles of law are developed through the creation of 'implied contracts' on the parts of the courts. In the particular instance an opinion is expressed by Justice A. L. Smith, that when parties appoint arbitrators 'there is an implied promise by the parties appointing the arbitrators and umpire jointly to pay them for their services.' The principle laid down is in no way unreasonable, but no one can doubt that it has not as yet been fully recognised by the courts, and that Justice A. L. Smith, when making the statement we have cited, in reality laid the foundation for a process of judicial legislation.

X supplies goods to *A* purporting to be of a particular description; he knows that *A* purchases the goods with a view to re-sale. *A* sells the goods to *M* as being of the description under which they were sold to *X*. Until the goods are used there is no means of knowing whether they answer the description or not. They do not answer the description, and *A* is sued by *M* for breach of contract. *A*, on the assurance of *X* that the goods really

answer the description under which they were sold, defends the action, and *M* recovers damages. *A* can in his turn recover these damages from *X* in an action for breach of warranty. This is the point determined by *Hammond v. Bussey*, 20 Q. B. Div. 79, and is, it seems, a fair deduction from the second part of the rule in *Hadley v. Baxendale*, 9 Ex. 341. Lord Esher's judgment should be specially noted as showing that the rule for determining the measure of damages for breach of contract, or, in other words, for deciding the true meaning of a contract, is to look to what damages 'may reasonably be supposed to have been in the contemplation of the parties.' Here, as elsewhere, the true meaning of a contract is determined by considering what is the meaning which a reasonable man would have put upon it under the circumstances of the case at the time when it was made.

The appeal in *Bentinck v. Fenn (Re Cape Breton Co.)*, 12 App. Cas. 652) unfortunately went off for want of any evidence that the selling director had not disclosed his interest in the property to the company. The measure of liability in such a case remains therefore unsettled, but Lord Macnaghten expressed an opinion (at p. 671) that if a director abstained from disclosing his interest and thus led the Board to purchase the property for more than it was really worth, it would be very difficult for him to escape from the charge of fraud. If so, such fraud would found an action of deceit, in which the excess over the true or market value would be recoverable, not perhaps as profits, but as damages. This will probably be sufficient to satisfy Lord Justice Bowen's moral sense. But what if the director uses his voting power as a shareholder to procure the ratification of the contract? This was the case in *North-West Transportation Co. v. Beatty* (12 App. Cas. 589). There the defendant director Beatty had sold a ship of his own to the company, and the contract being voidable a dispute arose whether the purchase should be ratified by the company. At the meeting, Beatty, being holder by himself and his nominees of more than half the shares, used his voting power to control the company in his own interest and carried the ratification. The Privy Council held that he was entitled to do so. Such a proceeding involves no conflict of interest and duty: for the two characters of director and shareholder are distinct. As was said in *East Pant Du Mining Co. v. Merryweather* (10 Jur. N. S. 1231) the disability of a director of a public company to vote in reference to a contract in which he is interested is only as director or trustee and not as shareholder. *Qua* shareholder he is not in any fiduciary relation, but a principal. Little harm is likely to result, for in proportion to the influence of his vote is the director's stake in the company.

The House of Lords has lately dealt with other leading cases of which we reserve critical notice until we have a full report. It has affirmed the decision of the Court of Appeal in *The Bernina* and in *Bunch v. G. W. R. Co.* and reversed it in *Easton v. London Joint Stock Bank*.

Leeds Estate Building Co. v. Shepherd (36 Ch. D. 787) recalls to mind the amusing passage in Lucian's Dialogues of the Dead, in which the chief actors in the Trojan war meeting in Hades try to shift the blame on to each other, Menelaus on Helen, Helen on Paris, Paris on Aphrodite, and so on. In vain! for Rhadamanthus, in the person of Mr. Justice Stirling, has fixed directors, manager, and auditor alike with liability. This is the first occasion on which auditors have been held liable or their duties defined. An auditor

must not confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but must inquire into its substantial accuracy, must ascertain that it contains a proper income and expenditure account, and a true and correct representation of the state of the Company's affairs. Anything less than this would make auditing illusory, a mere sham. The decision effectually dispels the notion that an auditor, because he is paid a small fee, may perform his duties in a perfunctory manner or rather not at all. It dispels too the notion that directors can evade liability by professing ignorance of the mode in which the balance sheets have been prepared and of inaccuracies in them, and saying (even truthfully) that they trusted to the manager and auditor. Directors are entitled to employ skilled agents such as auditors and to rely on their reports, but, like trustees, they cannot delegate their responsibilities to such agents. They must exercise their judgment as business men on the reports or balance sheets submitted to them, must apply their minds to them, just as trustees must to an investment approved by their valuer (*Learoyd v. Whiteley*, 12 App. Cas. 727). In a word, they, like auditors, must do their duty. Utopia was a great success, because all the Utopians were reasonable, virtuous, and obedient. If directors, promoters, managers, auditors, and secretaries could all be got to do their duty, what might not the City become?

Mr. Justice Kekewich disapproves the practice of citing as authorities the text-books of living authors and particularly of authors on the bench under the notion that these latter possess a quasi-judicial authority (*Union Bank v. Munster*, 37 Ch. D. 51); and this disapproval he tells us is shared by other judges. *Humanum est errare*; and this particular error of supposing that Lord Justice Fry the author and Lord Justice Fry the judge will take the same view on, say, a question of specific performance may be illogical but is certainly natural; as natural as that other illogical assumption, that the Court of Appeal sitting as a Divisional Court will take the same view in a higher sphere. True the author-judge has not had the rather questionable advantage of hearing argument, but then he is peculiarly conversant with the subject-matter. Lord Justice Bowen recently observed that *obiter dicta* were like chickens and came home to roost: the remark will apply to judge-written text-books. Only judges can help uttering *obiter dicta*, they cannot help having written text-books. The question which evoked Mr. Justice Kekewich's observations was whether on a sale by a mortgagee, the mortgagor employing a puffer would entitle the purchaser to resist specific performance, though the mortgagee was neither party nor privy to the fraud. Lord Justice Fry the author thought it would. Mr. Justice Kekewich decided that it would not. Perhaps both may be right. The fraud by a stranger is no such fraud as would render the contract voidable, yet it might be such that the Court would think it unfair to force the contract on the purchaser by a decree of specific performance.

What is sauce for the goose is not always sauce for the gander. In other words, a widow's antenuptial settlement in favour of the children of her first marriage may be treated as for value while a widower's is voluntary (*Re Cameron & Wells*, 37 Ch. D. 32, following *Price v. Jenkins*, 4 Ch. D. 483). Certainly it must be admitted that the authorities as to what persons are and what are not within the so-called marriage consideration are not in a very creditable state. Mr. Justice Kay goes further, and frankly confesses himself quite unable to understand the principle of Lord Hardwicke's decision in *Newstead v. Searles* (1 Atk. 265), upholding a widow's antenuptial

settlement in favour of the children of her first marriage against a subsequent mortgagee. For where, argued the learned judge, is the consideration moving from the children? Yet this decision has been followed in *Clarke v. Wright* (6 H. & N. 849) and *Gale v. Gale* (6 Ch. D. 144) and recognised as law in *Mackie v. Herbertson* (9 App. Cas. 303). The fact is that so long as the question is treated as one of who are within the marriage consideration, whether it be the children of the intended marriage or the issue of a former marriage, illegitimate children or collaterals, so long will the question continue to perplex learned judges. The true view it is submitted, the view which alone is consistent with all the decisions and is supported by eminent text-writers (Dart, V. & P., 6th ed., 1013; May, Fr. Ass., 2nd ed., 353), is that expressed by Mr. Justice Blackburn in *Clarke v. Wright*:—Was there a bargain on behalf of such children or collaterals by the wife or husband as the case may be? If there was such a bargain as part of what Lord Hardwicke terms the ‘reciprocal considerations’ between husband and wife on the marriage settlement, then the limitations in favour of such children or collaterals are not voluntary, though no consideration moves from them direct.

Suppose, as the late Mr. Dart suggests, that *A* agrees to pay *B* £10,000 in consideration of *B* conveying an estate to the use of *A* for life with remainder to a stranger the money paid and the conveyance executed, could it be said that the limitations in the settlement *ultra A*’s life were void upon the ground of the remainderman not being within the consideration of the £10,000? In such a case the purchase, whether the conveyance is to *A* and another jointly or to *A* and another successively, is a purchase by *A*, and a resulting trust of the remainder arises in favour of *A*, who advances the purchase money (*Dyer v. Dyer*, 1 L. C. 223). If this resulting trust is settled on *A*’s marriage in favour of *A*’s collateral relations, they take through a purchaser for value, and their title is therefore good against a subsequent purchaser or mortgagee from *B*. Where the limitation of the remainder is in favour of *A*’s children the resulting trust is no doubt rebutted, but only as between *A* and his children, not as between *A* and *B*. The question whether in fact the wife or husband has bargained for particular limitations is one that may be either presumed or proved. In favour of the children of the intended marriage it is always presumed, semble it is so in case of a widow in favour of the children of a former marriage. In other cases as the children of a widower by a former marriage or of collaterals of the husband or wife it must be proved. Mr. Justice Blackburn gives a fair test. ‘Where the limitations so interfere with those which would naturally be made in favour of the husband and wife and issue so as to indicate that the limitations must have been discussed and made part of the marriage contract part of the reciprocal considerations between the husband and wife, the presumption (that the stipulations were confined to the wife, the husband, and the issue) is rebutted and the limitations are not voluntary.’

Though the Companies Act has now been more than a quarter of a century in operation, its policy and provisions seem still only beginning to be understood. The price of the privilege of limited liability, as Lord Justice Turner said, is conformity to the conditions imposed by the Legislature, and one of those conditions ‘fundamental and inviolable’ is that the capital which alone is available to meet the claims of creditors shall not be reduced either directly or indirectly except in the manner provided by the Acts. This is why a company cannot purchase its own shares (*Trevor v.*

Whitworth, 12 App. Cas. 409). This is why there can be no set off against calls (*Grissell's Case*, 1 Ch. 528; *Re Whitehouse & Co.*, 9 Ch. D. 595), and this is why a company cannot issue its shares at a discount. The discount is so much withdrawn from the creditors' security. Until the recent case of *Re Addlestone Linoleum Co.*, *Benson's Case* (37 Ch. Div. 191), *Re Ince Hall Co.* (30 W. R. 945, followed by the same judge without comment in *Re Plaskynaston Tube Co.*, 23 Ch. D. 542) was the only authority on the issue of shares at a discount. In that case the shares were new shares, and Mr. Justice Chitty thought the issue at a discount was a disposal 'beneficial to the company' within Art. 28, Table A: on which it may be observed that if the issue at a discount were *ultra vires* the company, no article sanctioning it could avail. *Re Addlestone Linoleum Co.* decides two important points: (i) That registration of a contract under s. 25 of the Companies Act, 1867, does not make any difference or protect the allottee at a discount from payment in full on a winding up. Registration of a contract under the section only relates to the mode of payment, not the amount. It meets the case where the shares are paid for otherwise than in money or money's worth; but the full price in one way or another must still be paid. (ii) That a registered holder of shares issued at a discount cannot prove in the winding up in competition with creditors for damages for the default of the company in registering a contract under s. 25 (overruling *Mudford's Case*). This may be supported by s. 38 (7) of the Act of 1862, but the true ground is that taken in *Houldsworth v. City of Glasgow Bank* (5 App. Cas. 317), that the shareholder cannot take away in damages what he has agreed to contribute in any event to the creditors' fund. This is only another illustration of the inviolability of capital. The practice of underwriting companies, and for this purpose issuing shares at a discount to brokers, is becoming very common now, and it is most undesirable that any financial hocus pocus of this kind should secure the allottees immunity from their just liabilities.

The Duke of Devonshire v. Pattinson (20 Q. B. Div. 263) promised some curious antiquarian research into the royal prerogative of fishing; but after an interesting glimpse of the king sending his writ to the sheriff to close the river in preparation for his 'going a-angling,' as old Izaak Walton would say, the case resolved itself into a question of the construction of a grant. Hardly more than a year ago the Court of Appeal in *Micklethwait v. Newlay Bridge Co.* (33 Ch. Div. 133) affirmed the principle that a grant of land abutting on a river will be presumed to pass the bed of the river *ad medium filum aquae*; but this presumption is rebuttable, and rebuttable not merely (i) by the terms of the grant, but (ii) by evidence of subsequent user (in cases of old grants), e.g. the right of fishing having always been treated as a separate tenement, and (iii) by the subject-matter of the grant. Speaking of the analogous presumption *cujus est solum ejus est usque ad caelum et ad inferos*, Ashhurst J. in *Doe d. Freeland v. Burt* (1 T. R. 703) said, 'We know that in London different persons have several freeholds over the same spot. That is the case in the Inns of Court. Now it would be very extraordinary to contend that if a person purchased a set of chambers, leased them, and afterwards purchased another set under them, the after-purchased chambers would pass under the lease. . . . The construction of all deeds must be made with reference to the subject-matter; and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country.' This principle is as applicable in determining what quasi easements pass under a grant as what parcels. *Prima facie*, as *Wheelton*

v. Burrows (12 Ch. Div. 31, at p. 49) shews, there will pass to the grantee all those quasi easements which are necessary to the reasonable enjoyment of the property granted. Hence a person selling a house with windows in it cannot build on the remainder of the ground so near as to stop the lights of the house, and as he cannot do so so neither can his vendee (*Palmer v. Fletcher*, 1 Lev. 122: *Allen v. Taylor*, 16 Ch. D. 355). But what if the grantee of the house knew that the grantor intended to use the adjoining land for building? This was the question put hypothetically by Lord Justice Cotton in *Rigby v. Bennett* (21 Ch. Div. 559), and which actually arose in *Birmingham & Dudley Bank v. Ross* (57 L. J. Ch. 109), a grant of a building with windows in the business quarter of a town. Mr. Justice Kekewich adopted the opinion of Baron Wilde in *Hall v. Lund* (1 Hurl. & C. 676), that in cases of implied grant the implication must be confined to a reasonable use of the premises for the purpose for which according to the obvious intention of the parties they are demised, each case depending on its own circumstances. 'I hold,' said the learned judge, 'that the grantee of the house knew that the grantor intended to use the retained land for the purposes of building houses of business, and that what has been in fact erected thereon is not in excess of what he must be taken to have expected and assented to be erected.' This does not qualify the doctrine of a grantor not derogating from his grant. The grantor's right to build is not a reservation, but an exception: it is a more correct explanation than saying that the purchaser takes the property subject to all equitable interests of which he has notice.

Not to possess trustee-corporations argues us, to Mr. Justice Kay's mind, in a very backward state of civilization. Lord Hobhouse's carefully drafted Trust Companies Bill is not to become law this year, but the change is wanted and will come. Trustees will welcome it, for what office is so thankless as a trusteeship (except an executorship), or indeed so perilous? In vain are the trustee's best intentions, in vain is the ideal prudent man of business paraded before him in leading cases: he finds himself too late involved in a breach of trust, and the victim of remorseless *cestuis que trust*, for whom he has been over-zealous or to whose importunity he has weakly yielded. *Cestuis que trust* will welcome it, for it offers almost absolute security; and those conversant with the mysteries of the Chancery Division know well how large a part of the business of that branch is taken up with fraudulent and defaulting trustees. Whether the Bill will be equally welcome to the 'family solicitor' is more doubtful. The settlor or testator may authorise the work to be done by his own solicitor, but if he does, the Trust Company is not to be liable for such solicitor's 'negligence, misfeasance, non-feasance, or misconduct,' an alarming array of possibilities in view of which the settlor or testator may not care to run the risk. The most vital question, at what price these advantages are to be had, is left blank, to be determined by the Company's articles or by special agreement. Probably it is thought that charges will be brought to the lowest point by the competition of rival Trust Companies. *Hiddings v. De Villiers* (12 App. Cas. 624) shews that even a Trust Company may require looking after in the matter of charges.

Thrussell v. Handyside, 20 Q. B. D. 359, is perhaps too obviously right to be a very 'profitable' decision in the sense of our old writers. A hopeless case appears to have been argued with considerable ingenuity: the appellant's contention really came to this, that if *A* is working in the roof

and *B* on the floor of the same building, both having an equal right or duty of being there, *A* may perhaps be liable for dropping one rivet on *B*'s head, but after the first may, on the principle of *volenti non fit iniuria*, drop any further number with impunity, and *B*'s only remedy is not to work there at all. Knowledge of a risk may be evidence that one accepts the risk, but it is evidence at most.

R. v. Buckmaster, 20 Q. B. D. 182 (C. C. R.) is a plain case of 'larceny by a trick,' which adds nothing to the theory of the subject. The prosecutor deposited his money with a view to a genuine bet, the prisoner took it for the sole purpose of keeping it for himself at all events. On the one side there was no intention to part with the property, on the other there was the intention to deprive the prosecutor of it, therefore possession was not really delivered, but taken by a trick, the prisoner was a mere trespasser, and all the elements of larceny were present.

In *Merivale v. Carson*, 20 Q. B. Div. 275, the Court of Appeal has confirmed what we have always thought the true view of the ground on which fair criticism of matters fairly open to public comment is not actionable; namely, not that it is in the nature of a privileged communication, but that it is not a libel at all. As Bowen L.J. says in his judgment, in cases of privilege some one has a special immunity; *A* may say to *B* what *C* may not say, or what *A* might not say to *Z*. But the right of passing public judgment on things submitted to the public is a common and equal right of all men. Hence the critic's motive is not in issue. If the criticism be unfair, it is no excuse that he wrote in misguided zeal and not of malice; though perhaps the converse does not hold, for Lord Esher suggests (p. 281) that a comment proved to be malicious would not be real criticism at all. On the whole, the law declared in *Campbell v. Spottiswoode*, 3 B. & S. 769, 32 L. J. Q. B. 185, is maintained, and whatever is contrary to it in *Henwood v. Harrison*, L. R. 7 C. P. 606, is overruled.

The last few months have produced a crop of cases on covenants in restraint of trade. The conditions of trade have, it is obvious, greatly changed since the reign of Henry VIII, and are still changing; increased facilities of communication have enlarged the area of necessary protection. No absolute standard can be adopted; and this being recognised, the tendency of the modern authorities has been to accept as the test of reasonableness whether the covenant goes beyond what the covenantee's interests require or not; if it does not, it is valid; if it does, it is invalid (*Leather Cloth Co. v. Lorson*, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, 14 Ch. D. 351; *Davies v. Davies*, 36 Ch. Div. 359, 56 L. J. Ch. 481), encroaching thus on the older authorities, *Ward v. Byrne* (5 M. & W. 548), and *Hinde v. Gray* (1 Scott N. R. 123), which treated it as clear law that a covenant not to carry on a lawful trade unlimited as to space was on the face of it void. In *Davies v. Davies* (to which we could barely call attention in the January number) a partner in a firm of galvanised iron manufacturers at Wolverhampton covenanted 'to retire wholly and absolutely from the partnership, and so far as the law allows from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as either directly or indirectly to affect' the continuing partners. Kekewich J. held that the words 'so far as the law allows' meant so far as the doctrines of English law as interpreted by the decisions of the Courts allowed, and was not too vague, nor its restrictions unreasonable. The Court of Appeal (36 Ch. Div. 359) reversed this

decision, holding (1) that the parties must themselves fix the limits, and not leave it to the law to do so; and (2) that the covenant was either a covenant to retire altogether from business, and as such void, or at all events too vague to be enforced. While inclining to mould the law so as to meet the exigencies of modern trade, the majority of the Court were of opinion that the older doctrine requiring every restraint of trade to be partial was too 'engrained' in our law to be abrogated by any authority but that of the House of Lords. *Leather Cloth Co. v. Lonsont* was, as the Court observed, a peculiar case, the restriction there against trading being, as Wickens V.C. pointed out in *Allsopp v. Wheatcroft* (L. R. 15 Eq. 64), 'only a consequence of a clearly lawful restriction against divulging a trade secret.'

This opinion, however, is not part of the decision. For, though Cotton L.J. based his own decision on that ground (see at p. 398), Bowen L.J. did not (see at p. 391), and Fry L.J. adhered to his former opinion (p. 396). It is disappointing to find Cotton L.J. repeating the old error that a case in the Year Book of Henry V (2 Hen. V, 5, pl. 26) 'laid down generally that covenants in restraint of trade are bad.' The condition in that case was in fact limited to one town in space and to half a year in time, and the opinion that it was against the common law was expressed only by one judge. The defence actually made was that the condition had been performed.

A covenant in restraint of trade, though too extensive, may nevertheless if severable be enforced to the extent to which it is reasonable. There are several instances of such a covenant being held severable as regards space. In *Baines v. Geary* (35 Ch. D. 154) the covenant was held severable as regards time, following *Nicholls v. Stretton* (10 Q. B. D. 350). In *Vernon v. Hallam* (34 Ch. D. 748) a covenant against trading under a particular name was held good, though unlimited as to space. In *Hill v. Hill* (35 W. R. 137) a covenant not to engage in or be in any way concerned or interested in a similar business within ten miles of the Royal Exchange was held broken by the covenantor becoming an employé in a firm engaged in a similar business within the prohibited radius. In *Parsons v. Cotterill* (56 L. T. R. 839), a radius of 50 miles from Burton-on-Trent was held not an unreasonable restraint for a wine and spirit firm to impose when engaging a traveller, without any limit of time.

Covenantants desiring the maximum of protection have no doubt a difficult task. When they fail it is commonly because, like the dog in the fable, they grasp at too much and so lose all.

Few are the readers who note minute errors in the books they read, fewer those who have the charity (for it is the truest charity) and will take the pains to communicate them to the author. The Editor of this REVIEW received some valuable corrections the other day from an anonymous correspondent, and having no other means of expressing his thanks to the unknown writer, begs to thank him here. It may be added that among scholars definite and verifiable corrections, offered for sound learning's and not for controversy's sake, are always acceptable. Neither should any one assume that the communication of obvious corrections is superfluous. For a flagrant error, the omission of a 'not' for instance, or the substitution of 'purchaser' for 'vendor,' is just that which, if it escapes the author and the printer once, is likely to escape them again.

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The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE LAW QUARTERLY REVIEW.

No. XV. July, 1888.

A NOTE ON THE FACTORS ACTS.

AS a bill for the consolidation or codification of the Factors Acts is in preparation, it may not be amiss to direct attention to one or two points of some importance which present themselves on a consideration of those statutes. Almost all the provisions contained in the several Factors Acts, 1823, 1825, and 1842, deal with cases where a person intrusts goods or the documents of title to a factor or agent for sale, and such agent disposes of them without the authority or in excess of the authority given to him by his principal: and the effect of the enactments is to give, under certain circumstances, a good title to the person to whom the agent has so disposed of the goods or documents.

There are however three sections of the Factors Act, 1877, which deal with cases of a very different kind and to which very different considerations apply:—

The third section of that Act relates to the case of the owner selling the goods and himself afterwards disposing of them to another person before the first purchaser has obtained possession of the goods or documents of title. The section is in the following words:—‘Where any goods have been sold and the vendor or any person on his behalf continues or is in possession of *the documents of title thereto*, any sale, pledge or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge or other disposition is made has not notice that the goods have been previously sold.’

This enactment, it is well known, owes its origin to the judgment in *Johnson v. The Crédit Lyonnais* (3 C. P. Div. 32), and was intended to overrule or do away with that decision. It is evident however that the section has a far wider effect. It applies not only to the case where the documents of title are left by the purchaser in the vendor's possession, but also to the case where the vendor has got possession of them after the sale: it applies not only to the case where the second purchaser has the documents transferred to him at the time of his purchase, but also to the case where he may be even unaware of their being in the vendor's possession. Such being the scope and extent of this enactment, there seems no reason why it should not be still further extended to every case in which the goods are left in the vendor's possession, instead of being confined, as it appears to be, to the case of the documents of title being in his possession.

Moreover, there is no doubt the section is very imperfectly framed. It could never have been intended to apply (although literally construed it does so apply) to a case where the second purchaser has not obtained possession of the goods or documents of title, for in such case there is no reason whatever why he should be preferred to the first purchaser: on the contrary, it is manifest that he ought to have no such preference.

From these considerations it seems to follow that instead of this third section it should be in substance enacted that the title of a purchaser who does not take possession of the goods or documents of title should be postponed to that of a person who has *bona fide* obtained possession of such goods or documents.

As regards the fourth and fifth sections of the Factors Act, 1887, on a careful perusal of them it will be found very difficult exactly to ascertain for what purposes they were introduced. For the fifth section covers the case provided for by the fourth section, and indeed it is not easy to conceive any other case which it can embrace. It will therefore be sufficient to re-enact in substance the fourth section and to leave out the third altogether.

As regards all the other provisions of the Factors Acts, 1823 to 1877, relating to the disposition of goods by factors or agents, they have been held to apply only to agents intrusted with them for the purpose of *sale*. It may, however, be well worth while for lawyers and merchants to consider whether those provisions should not be extended to the case of agents intrusted with goods or documents of title for the purpose of obtaining advances on them, and who obtain such advances in the usual course of business.

I believe the general opinion of merchants and bankers would be strongly in favour of such an alteration in the law. I have also no

doubt that the mercantile world is very anxious since the recent decision in Lord Sheffield's case in the House of Lords that a similar protection should be afforded in the case of brokers intrusted with negotiable instruments for the purpose of obtaining advances on them.

That anxiety, as I hope to show on a future occasion, is justified by very valid reasons:—

The decision in Lord Sheffield's case certainly took the mercantile world by surprise, for in the case of *Goodwin v. Roberts* (L. R. 1 App. Cas. 476), decided in the year 1876, the Bankers were held entitled to retain the negotiable instruments on which they had advanced money, although they took them from a broker. It is true that it was not *proved* in that case that the Bankers knew that the broker was not the owner of the securities, but there can be scarcely any doubt that in fact they had such knowledge. The very eminent Counsel who argued the case did not think it necessary to prove that fact, nor was it in any way suggested by any of the noble and learned Lords who delivered their opinions in the case, that a person who advances money on negotiable instruments to an agent known not to be the owner of them, is put upon inquiry as to the broker's authority. It seems to have been generally assumed that a person who advances money *bona fide* on negotiable instruments acquires a good title and need not inquire into the authority of the agent from whom he receives them.

ARTHUR COHEN.

THE LOCAL GOVERNMENT BILL.

MOST persons who are not lawyers find Mr. Ritchie's Bill too difficult for them. They are not familiar with the complex institutions which it seeks to modify, nor with the principles which give unity to the numerous changes which it seeks to effect. Its natural arrangement has been somewhat distorted in order to increase its chances of becoming law. Long as it is in appearance, it is still longer in reality. For by a few words of Clause 76 it incorporates nearly half of the provisions of the Municipal Corporations Act of 1882, one of the most voluminous Acts on the Statute-book. Yet in its essence the Bill is simple enough. The law of local government may be grouped under four principal titles:—I. Constitution of the several kinds of local authority. II. Apportionment of duties between them. III. Administrative rules determining the mode of performing each of these duties. IV. Organization of local finance. If we except the licensing clauses, which were an excrescence on the symmetry of the Bill and have now been abandoned, very few of its provisions come under the third title. But it makes a revolution in the law comprised under each of the other titles. It sets up a new system of local authorities, entrusts them with a new combination of duties, and places their finance on a new footing. Let us take these changes one by one.

I. Changes in the constitution of local authorities.

Speaking generally, we may say that the Bill has two objects in view. In the first place it proposes to extend all over England a system of local administration hitherto confined to corporate towns. In the second place it proposes to combine town and country districts alike under a body invested with higher powers, although fashioned on the same municipal model. It but slightly affects the lowest grade of local organization. It introduces a certain uniformity into the intermediate grade. The highest grade it transforms altogether. The parish it neither abolishes nor reforms. It leaves untouched the board of poor-law guardians and the school-board. These bodies already exist as independent authorities in the municipal borough. Their survival in country districts is quite compatible with that uniformity in town and country which the Bill seeks to promote. But beside them it sets up a new local authority, the district council. It also substitutes for the Quarter Sessions the county council. Although the Bill

begins with creating the county council, we shall find it more convenient to begin with considering the intermediate authority. It is the more elementary of the two.

By what steps does the Bill proceed to establish a new municipal authority in every district?

It uses as far as possible the existing local divisions. The Public Health Acts have already divided the whole of England into sanitary districts, urban or rural. But most of these sanitary districts are older local divisions re-named. An urban sanitary district is an urban area governed either by a town council, or by a local board, or by improvement commissioners. A rural sanitary district is co-extensive with a rural union, unless part of the union has been brought within the bounds of some urban sanitary district. In a rural district such of the guardians of the poor as are chosen by the ratepayers of the district have the powers and duties of a sanitary authority. The Bill, whilst adopting the sanitary district, establishes in every such district which did not already possess it an authority exactly similar in constitution to a town council. The distinguishing feature of a town council is its democratic constitution. In its election every resident ratepayer has an equal share, and is entitled to offer himself as a candidate. In the election of most other local bodies property gives a plural vote, and a property qualification is essential for candidates. The extension given to the municipal system is of more practical consequence in the district than in the county. For it is in the smaller area that men of small means will first press to take office.

The new district council supersedes not only all sanitary authorities other than town councils, but also all the existing highway authorities, namely, several hundred highway boards and several thousand parish surveyors of highways. It supersedes all the authorities charged with the execution of the Burial Acts. It also supersedes a variety of authorities created in particular places for particular purposes. Lastly, in the few cases where a local board has hitherto existed side by side with a town council, it is merged in this last. By these changes much is gained in uniformity and in simplicity. Yet in every district there will still be local authorities of three classes; the general local authority created by the Bill, the authority which administers the poor-law, and the authority which administers the Education Acts. The two last are virtually one in every parish which has no school-board, since the school attendance committee is always composed of guardians of the poor. But the district council and the board of guardians are necessarily distinct, for they have totally different constitutions. We are far from saying that this arrangement is a bad one. The

administration of the poor-law is a difficult business, which becomes more and more difficult as it becomes more and more a favourite topic with social and political mischief-makers. The other duties of local administration are quite enough for a new body, whose efficiency must for some time be matter of conjecture. Similar reasons justify the preservation of the school-boards. There will remain some confusion of areas. For the sanitary district and the poor-law union do not always coincide. The method of the Bill is not to remove such anomalies, but to give power for their removal.

As the poor-law union remains intact, the parish remains with it. But every reduction of the power of the board of guardians reduces the consequence of the parish, which is the guardians' constituency. That consequence is partly transferred to the wards into which the new districts will be divided. Much has lately been said about the necessity of reviving the parish. But it must be remembered that the parishes are mostly small, and often very awkward in shape. Before they could be made serviceable, they must be shaped anew, grouped or divided to an extent which would injure their old associations and excite much ill-will. Even when remodelled, they would be only of limited use. It is absurd to think of undoing every local reform of the last fifty years, and of restoring the relief of the poor and the care of the highways to little groups of thirty or forty families. Bulgaria or the Punjab may be a better ordered country than England, but England cannot therefore copy the institutions of the Punjab or Bulgaria. Yet the confusion of primary areas, which the Bill rather augments than lessens, is a real evil and will give work to subsequent reformers. The district must be preserved; but within the district room may be made for the parish.

Then the Bill establishes in every county a county council. This also is framed on the borough model. The chairman, however, must have the qualification of a justice of the peace. For the election of councillors the county will be broken up into electoral divisions, and in forming these, population is chiefly to be considered. As to the boroughs which will remain in the county, their proportion of members in the county council will be fixed by the Local Government Board. A borough returning only one councillor will form an electoral division by itself. In a borough which returns more than one councillor, the town council, and in the rest of the county the Quarter Sessions, will decide what the electoral divisions shall be. Only it is provided that no electoral division shall be made up of fragments of two or more districts. Everywhere the liberties and the franchises are to be merged in the

adjoining counties. But the ridings of Yorkshire and the divisions of Lincolnshire are to be treated as counties by themselves.

The final decision of the question as to which boroughs shall be included in the county and represented on its council is the product of two contending desires. On the one side there was the desire to set up a strong county government, which should relieve the imperial government of part of its work and also bind together all the subordinate authorities in the county. This desire would lead the reformer to reduce as far as possible the number of independent boroughs. On the other side was the desire to conciliate local patriotism and local jealousy, which has led the reformer to enlarge the list of boroughs enjoying immunity from the county jurisdiction. This feeling has prevailed, and has given the privileges of a separate county to every borough of 50,000 inhabitants, besides confirming those privileges to certain smaller boroughs, such as Exeter and Canterbury, which have always enjoyed them. Thus the prevailing character of the county will continue to be rural.

II. Apportionment of duties between the several local authorities.

First, as regards the district councils. Although these are uniform in their constitution, their powers differ considerably. Such district councils as are also town councils preserve their old powers, if we neglect certain functions transferred to the county from small boroughs. Thus every borough of more than ten thousand inhabitants will retain the command of its own police. Again the district council in every instance takes over the functions of the former sanitary authority. But these were necessarily more important in urban than in rural districts; and thus the district council which succeeds a local board or board of improvement commissioners will have more work than a district council which succeeds to the guardians in their capacity of sanitary authority. Then the district council takes all the duties of the old highway authority, except the care of main roads, which is now given to the county. But the roads in South Wales and the Isle of Wight are left in charge of the former highway authorities. These parts of the kingdom have administered their highways on a peculiar system which has answered very well, and is to be preserved. The district council is also entrusted with the execution of the Burial Acts, the Lighting and Watching Acts, and various other Acts of less consequence. Lastly, the district council acquires certain powers now exercised by justices out of sessions, such as the power of granting pawnbrokers' certificates, and the power of changing the date at which a fair is held, or of abolishing it altogether. District councils jointly interested in any matter are empowered to act through a joint committee. This is a valuable

privilege. Experience has shown, for instance, that a single medical officer appointed by a number of sanitary authorities acting together and paid a good salary is much more efficient than several medical officers, each acting for a single authority, and receiving only a nominal payment.

Secondly, as regards county councils. The powers of the new county councils form a singular assemblage. It takes over the administrative work of the Quarter Sessions of the county. But to this rule there are one or two important exceptions. The Quarter Sessions are still to appoint the chief constable of the county. They are to share the control of the police with the county council. For this purpose a standing joint committee is to be appointed. Joint committees of the Quarter Sessions and the county council may be appointed for any other purpose which concerns both bodies. This provision, also, may be of great use in administration. Then the Quarter Sessions may still appoint a committee to visit the lunatic asylums. Not only the judicial business of hearing appeals against rates, but the financial business of assessing to the county rate is retained by the Quarter Sessions. Finally, all powers not expressly taken from the Quarter Sessions are by a general proviso reserved to them.

The relation of the county council to the councils of those boroughs which are included in the county is a little intricate. The Bill divides such boroughs into three classes. (1) Boroughs having a court of Quarter Sessions and a population of at least 10,000. (2) Boroughs having a court of Quarter Sessions and a population of less than 10,000. (3) Boroughs which have neither a court of Quarter Sessions nor a population of 10,000. In boroughs of the first class the town council retains practically all its administrative functions. In boroughs of the second class the town council loses such functions as have hitherto been assigned to the town councils of Quarter Sessions boroughs only. In boroughs of the second, and also in boroughs of the third class, the town council loses certain other functions which have hitherto belonged to all town councils. Only one of these, namely, the function of maintaining a separate police, is of any gravity whatsoever. For this innovation a precedent had been given by the statute which forbids the establishment of a separate police in any newly incorporated borough with less than 20,000 inhabitants. Thus the transfer of power from town councils to county council is as limited as is compatible with setting up a real county authority, which should link town and country together.

The county council takes from the expiring highway authorities the charge of the main roads. Hitherto the highway authorities

have maintained these roads and defrayed one-fourth of the cost of so doing. One-fourth was contributed by the Treasury, and the remaining half by the county. But even now an urban authority may within a limited time claim the right of repairing a main road within its jurisdiction.

Certain other powers, without being taken from any local authority which now enjoys them, are communicated to the county council. Such a power is that of enforcing the law against the pollution of rivers, formerly possessed only by the sanitary authority, and such is the power of making bye-laws for the better government of the county, a power modelled upon that which a town council exercises within its borough.

Lastly, many powers not hitherto regarded as local are conferred upon the county council. The eighth clause confers upon it those powers of the Secretary for the Home Department, of the Board of Trade, and of the Local Government Board, which are enumerated in the first, second, and third parts respectively of the first schedule. Some of these powers are important; but most of them can be only occasional in their exercise. The same clause provides for a further delegation of power as from time to time may seem desirable. By Order in Council approved by Parliament any powers and duties of any of the above authorities or of any other department of state may be delegated to the county council. This sweeping enactment is qualified by the following proviso: that the powers and duties so transferred must have been created by statute; that they must be administrative in character, and that they must be such as arise within the county. Even so, there is a wide field left for experiment. It will be interesting to observe to what extent and with what success this clause will be used. Every application for a new charter to a borough must in future be made through the county council, but it does not appear whether or no the county council is to have any discretion in respect to the application.

III. Changes in local finance.

Those proposed in this Bill are of the utmost consequence. Three in particular call for notice. First, as to the aid which the imperial is to afford to the local exchequer, the Bill seeks to effect several distinct objects. It seeks to complete the severance of local and imperial finance begun last year by the creation of the Local Loans Fund. It enacts that in future the local authority shall not receive grants out of the Consolidated Fund, but shall intercept the whole or a fixed proportion of certain taxes which to that extent will appear as items, not of national, but of local revenue. It seeks to redress the unequal pressure of

rates upon real property by choosing for the above purpose such taxes as are levied upon personal property. Lastly, it seeks to overcome the local prejudice in favour of outdoor relief as being economical by enacting that the proportion of the probate duty assigned to local purposes shall be divided among the counties with reference to the amount of indoor relief given in each, and that out of the grant a capitation shall be allowed for every person receiving indoor relief in the county. Then the Bill contains a remarkable series of provisions respecting local loans. The enactment, Clause 66, that no county council shall contract debts to the amount of more than two years' rateable value of the county reads almost like an injunction to be wasteful. All the outstanding debts of local authorities in England, monstrous as they are, do not amount to such a sum. No English county is at present indebted on the county account to more than a fortieth of its rateable value. It is inconceivable that a minister should imagine and a cabinet approve anything so outrageous. Indeed the multiplied facilities for borrowing given by this Bill constitute its most serious blemish. Thirdly, the Bill provides that both the district and the county councils shall every year make a regular budget of income and expenditure. This is an excellent provision, but would be more useful if the law required such budgets to be published in the local newspapers.

We have said nothing about the now defunct licensing clauses. Nor have we said anything about the special provisions for London. These are skilfully adapted to a peculiar set of circumstances. On the one hand so great a city needs some strong, dignified, and representative authority. On the other hand the concentration of power and business in the hands of a town council of the usual type would for London be useless and dangerous. The proposed county council would probably be the best possible municipal assembly for London. But the reform of local administration in London is too extensive a subject to be dismissed in a paragraph.

F. C. MONTAGUE.

PUBLIC MEETINGS AND PUBLIC ORDER.

V. THE UNITED STATES.

THE United States of America, for the most part, adopt and act upon the common law of England as the basis of their jurisprudence. This statement applies not only to the early common law strictly so called, but also to such early English statutes as involved general fundamental principles, and were in their nature permanent and applicable to our situation and circumstances. Thus the statutes 32 Henry VIII. c. 9, as to buying pretended titles, 33 Henry VIII. c. 1, against cheating by false tokens, 13 Eliz. c. 5, as to fraudulent conveyances, 43 Eliz. c. 4, in regard to charitable gifts, and many others, have in most states the force of law, though never formally re-enacted here by any legislative tribunal. The same remark applies, to a certain extent, to the criminal law. The general fundamental principles of the English criminal law, with its definitions of crimes and tests of guilt, are generally followed in this country; but the English criminal statutes have not been adopted to the same extent as those relating to merely civil rights of property. This is especially true as to statutes prescribing remedies or modes of procedure. With this preliminary observation we come to the subject of this article.

The constitution of the United States provides that Congress shall make no law 'abridging the freedom of speech or of the press, or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.' And a similar principle is found in some state constitutions that 'the people have a right in an orderly and peaceable manner to assemble to consult upon the common good.' It is generally supposed that these provisions are only a constitutional embodiment of the English Bill of Rights declared in stat. 1 William and Mary, second session, ch. 2 (1688). Whether this statute practically repealed the earlier one of 13 Chas. II. c. 5, limiting the number of petitioners to twenty (unless approved by certain magistrates), as maintained by Mr. Dunning in the House of Commons (New Ann. Reg. 1781, vol. 2), or left it still in full force, as asserted by Lord Mansfield in the trial of Lord George Gordon (Douglass, 591), it is certain that no such limitation or restriction of the right of petition exists in America under the foregoing constitutional provisions. With this understanding it may be safely assumed, we think, that the common law on the subject of

unlawful assemblies with their not unfrequent development into routs and riots, is not affected by our constitutional provisions, or by the 'freedom of speech' therein secured; and that the common law of England is the common law of America. Great 'freedom of speech' is allowed in expressing one's *opinions*, both of laws and lawmakers, but not in exciting the hearers to violate the one, or assail the person or property of the other. Possibly the public authorities in America have less jealousy and anxiety about such public meetings; possibly more toleration or at least more indifference about what may be uttered at them; possibly also our peace officers are more reluctant to interfere in the early stages of disorder than in the old country, or at least than was the case in former times; but with this qualification, and the further fact that the number required to constitute an unlawful assembly has in some states been changed by statute, the two countries are in substantial accord. We are warranted therefore, we believe, in thus stating the American law on this subject.

1. That is an 'unlawful assembly,' justifying an interference by the police, where three or more persons assemble to counsel or prepare for the accomplishment of some unlawful object, especially if that object be the commission of some felony or other crime. This is too obvious to need elaboration. An officer's right to arrest a *single* individual about to commit such an offence surely cannot be less when, from the encouragement and support of numbers, the danger is still greater that the felony will be accomplished. The meeting is simply a conspiracy on a larger scale.

2. That is an unlawful assembly where three or more meet to carry out some object legal and proper in itself, but by the use of illegal and unjustifiable means, such as threats, intimidation or actual violence.

3. It is equally an unlawful assembly, if the persons originally meet to accomplish such object by *only legal means*, but under the excitement of the occasion resolve or prepare to carry out their purpose by unjustifiable or illegal means. From that moment the meeting becomes an unlawful assembly, and is subject to all the consequences thereof.

4. The last two propositions apply equally to assemblies to accomplish some public object, effect some change in public laws, or reform some public and general grievance, as well as to meetings called to redress some private wrong or secure and maintain some private right. But public grievances, though real and pressing, can no more be remedied by force and violence (except by revolution) than imaginary private wrongs. The ballot and not the bullet is the constitutional method; the one is free, the other not.

It should be noted however that in America efforts to accomplish a change of laws by violence or intimidation have never been considered as *Treason*; since that offence consists only 'in levying war against the United States, or in adhering to their enemies.'

5. A public meeting therefore becomes unlawful so soon as from general appearances and all the surrounding circumstances it naturally excites terror, alarm and consternation in the minds of peaceable and law-abiding citizens; so soon as in the minds of rational and firm-minded men it is likely to endanger the peace and tranquillity of the neighbourhood. Of course the circumstances must be such as would naturally produce fear and alarm in men of reasonable firmness and courage, and not merely in the minds of timid women. When that condition of things exist, that moment the peace officer may intervene and disperse the assembly. Whether that state of things does or does not exist must be finally passed upon by a jury of the country in prosecutions arising out of such interference. No abstract rule can be laid down beforehand, but it is safe to say that in America the inclination of juries, as a rule, is to support law and order, and to protect the officer in the *bona fide* discharge of his apparent duty on such critical occasions. But while no formula or rule can be prescribed for determining the existence of an unlawful assembly, yet some circumstances are always indicative of such a character, and are generally relied upon as sufficient proof of the approaching storm. Thus if the persons meet at an unreasonable hour; if they come armed with deadly weapons; if they listen to and applaud inflammatory speeches which counsel force and violence; if they display banners holding up to ridicule and contempt other persons and organizations in the community, the natural tendency of which is to arouse the other's passions, and provoke an attack upon the meeting; if they approve or propose to march tumultuously in a body, with their arms and banners, to some other place where parties holding opposite sentiments are assembled, or to a part of the city where the latter reside or congregate, these, and many other circumstances, tend to show minds so 'fatally bent on mischief' that friends of peace and order may well be alarmed, and request the peace officers to interfere. The latter are not bound to wait until the proceedings have ripened into a positive riot. It is the right and duty of peace officers to prevent such a consummation of the unlawful purpose.

6. When the right and duty of the peace officer to interfere once arises, that right is to make an *effective* interference. If the assembly refuses to disperse upon his order, he may arrest the ringleaders, and for that purpose may call upon and require all bystanders to assist. If resistance is made, he and his assistants

may use all necessary and reasonable means to overcome such resistance, even to the use of deadly weapons, and if death of the guilty parties is thereby caused, the homicide is justifiable. On the other hand, if the officer or his assistants are slain, it is nothing less than murder; not only in those who actually commit the deed, but also in all members of the meeting who aid and abet the leaders in such resistance.

7. It is not only the right but the positive duty of all bystanders, when called upon, to assist in arresting the participants in a riotous assembly, and they are liable to criminal prosecution if they refuse such aid. Indeed they may in extreme cases, in the absence of magistrates and public officers, arm themselves and put down a riot, and if slain in the exercise of reasonable and necessary means of preserving the peace, their death is wilful murder in the rioters.

8. If, as generally understood in America, notwithstanding the doubts entertained in England at the time of the London riots of 1780, private citizens have a right to interfere and to put down a riot, or quell a disturbance of the public peace, even without any order or request from magistrates or peace officers, it necessarily follows that officers *de facto* though not *de jure* must have such right; and therefore are protected in the exercise of it. They do not lose their rights as citizens, merely because they wear an officer's uniform, though their official appointment may be open to criticism.

Much judicial authority exists in America for this proposition, both in the case of riots and also in arrests of individual wrongdoers.

9. This statement of abstract principles may be best illustrated by a few notable instances which have occurred in different states. In some of these cases there was an actual riot, but the principles of interference in unlawful assemblies are believed to be the same as in positive riots. Indeed an unlawful assembly as above described is only an incipient riot.

(1) About the year 1844 a new political party was organized in several of the states, called the 'Native American Party,' one object of which was to procure an alteration in the laws relating to the naturalization of foreigners, by which additional stringency and safeguards should be established, and the power of the foreign vote at the polls be somewhat restricted.

This step created great excitement among the foreign population. On the 3rd of May, A.D. 1844, a public meeting of about three hundred persons assembled in Philadelphia, in the state of Pennsylvania, to promote the objects of the new association. After

the organization of the meeting, and while one of the party was addressing the assembly, it was interrupted by a large number of foreigners. A scene of confusion arose, the opponents of the meeting rushed forward, pulled down the platform and dispersed the meeting. The persons present then adjourned to a subsequent day, but were no sooner assembled on that occasion than the meeting was again interrupted by a number of Irishmen, who fired upon the gathering, and one member of the American party was killed. This occurrence aroused the most intense excitement in the public mind, and an indignation meeting was held a few days afterwards, on the 7th of May, by those favouring the new party, the call to which contained these words, 'Let every man come prepared to defend himself;' and an American flag was displayed, bearing the inscription, 'This is the flag that was trampled upon by the Irish papists.' The assembled people marched tumultuously into the Irish quarter, where in a general mêlée a man named Matthew Hammitt was killed by a party of the Irish. John Daly, one of the latter, was indicted for the murder of Hammitt, and on his trial the presiding judge thus laid down the law:—

'If the call for the first meeting of native Americans, held May 3rd, was addressed exclusively to persons favourable to its objects, the interference of others hostile to its proceedings, and the breaking up and dispersion of the meeting by them, was a gross outrage on the rights of those who called it. It was a riot of a flagrant kind. Any body of citizens having in view a constitutional or legal purpose have the right peaceably to assemble together for its consideration and discussion. Any attempt by another body of citizens opposed to the objects of the assembly to interrupt and disperse it, is not to be tolerated. Every attempt by force and violence to interfere with the right of citizens to meet and discuss proposed lawful measures, is a direct infringement of a vital principle of our institutions, state and national.

'But a public meeting, otherwise legal, may from the manner, place and circumstances of its organization become an unlawful and even a riotous assembly. Thus if the indignation meeting of the 7th of May, at which Hammitt was killed, was convened under a notice to those who should attend "to come armed;" and if in pursuance of such suggestion it was attended by persons armed with deadly weapons, and if the meeting so summoned and assembled proceeded to march in a body to a part of the city chiefly inhabited by a foreign population, openly exhibiting arms and displaying banners with inscriptions offensive to such foreign citizens, the assembly sinks from the dignified position of a body of freemen, exercising a great constitutional right, into a mere riot.'

And as to the right of officers to interfere with and put down such an unlawful assembly, the same learned judge in his charge to the grand jury, which had the duty of investigating this riot, thus instructed them:—

‘An unlawful assembly may be dispersed by a magistrate whenever he finds a state of things existing calling for interference in order to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. A magistrate may not only himself arrest the offenders, but may authorize others to do so by a mere verbal command, and all citizens present whom he may invoke to his aid are bound to promptly respond to his request and support him in maintaining the peace. When the sheriff of the county, mayor of the city, or other known conservator of the public peace, has repaired in the discharge of his duty to the scene of the tumult, and there commanded the dispersion of the unlawful or riotous assembly and demanded the assistance of those present to aid in its suppression, from that instant there can be no neutrals.

‘The line is then drawn between those who are for and those who are against the maintenance of order. All who join in unlawful and riotous assemblies are responsible criminally for the acts of their associates done in the furtherance of their common object. When engaged in the suppression of dangerous riots the sheriff and associates are authorized to resort to every means necessary to maintain the public peace and prevent the commission of criminal outrages against persons or property. They may arrest the rioters, and detain and imprison them. If they resist the sheriff and his assistants in their endeavour to apprehend them, and the danger is pressing and immediate, the sheriff and his assistants not only may, but are bound to do their utmost to put down riot and tumult, and preserve the lives and property of the people. If the rioters resist the sheriff and his assistants in his endeavour to apprehend them, and continue their riotous actions, the killing of them under such circumstances is justifiable. This doctrine is undoubtedly sound, both in reason and in law, in case of an individual crime. And if possible it is still clearer when similar enormities are attempted by vast and riotous assemblies, and when the known officers of the law are engaged in the endeavour to prevent their consummation. The protection given to officers of justice engaged in enforcing the laws is full and unequivocal. If persons having

the authority to arrest or otherwise to execute the public justice, are using proper means for that purpose and are resisted in so doing, and the party resisting in the struggle is killed, it will be murder in all who take part in the resistance.'

(2) In the year 1849 serious riots occurred in New York City, called the 'Astor Place Riots,' arising from some popular expressions of disapprobation at the performance in the Astor Place Opera House, accompanied by an attempt to fire the theatre building. The grand jury, in their investigation of the disturbance, were thus instructed by Judge Daly: '*Any tumultuous assembly of three or more persons brought together for no legal or constitutional object, deporting themselves in such a manner as to endanger the public peace and excite terror and alarm in rational and firm-minded persons, is unlawful; and whenever three or more persons in a tumultuous manner use force or violence in the execution of any design wherein the law does not allow the use of force, they are guilty of a riot.*'

And as to the power of interference and arresting the parties participating in such unlawful assemblies, Judge Daly declared: 'All magistrates are empowered to preserve the public peace, and justified in using whatever degree of force may be necessary for that purpose. In England, from which we derive the common law, the extent to which the authorities may go, and the manner in which they shall employ extreme force, has been a matter of statute regulation from the time of Edward IV. These statutes have undergone various changes and modifications, and such of them as were passed prior to our Revolution not being applicable to our form of government, are not in force in this state. The extent to which force may be used, and the manner in which it should be employed, rests with us therefore upon the principles of the common law, in connection with certain statutory provisions of our own which have been enacted. From the long existence of the English statutes it has been supposed that the right to employ extreme force for the suppression of riots was derived solely from the statutes; but Chief Justice Hale, a great authority on the common law, and one of the most fearless and upright of judges, says that the right does not depend upon the statute, but exists at common law; that any magistrate or sheriff, if a riot cannot be otherwise suppressed, may have the use of such force as shall be necessary, and that if, from the employment of it, death ensues, the act is justifiable.'

(3) About the year 1855, a stringent liquor law was passed in the State of Maine, popularly called 'The Maine Law,' which prohibited all sales except by the municipal authorities, and authorized them to purchase, keep and sell under certain restrictions. This

law was very unpopular in large cities. In Portland, in that state, the Mayor, Mr. Neal Dow, supposed to be the author of the law, purchased a quantity of liquors, intended for sale by the city authorities under the law, and which were stored in one of the city buildings. On the night of the 2nd of June, 1855, a large body of people, men and boys, amounting to over a thousand, assembled around the depository of the liquors, evidently bent on mischief, probably intending the destruction of said property. The building was defended by the authorities civil and military, and the excitement was intense. The Riot Act was read by the Mayor, and the crowd ordered to disperse. They heeded not the order, and the tumult continued to increase in violence and desperation. The building was assailed by stones and other missiles, and a number of the police and military were wounded. The latter were ordered by the Mayor to fire on the crowd, and one of the ringleaders named John Robbins was killed. A coroner's inquest was held and unanimously found that he was killed by some one, acting under the Mayor's authority, in the defence of the city's property from the ravages of an excited mob, of which said Robbins was one. The right to use such extreme measures was so obvious that no indictment was ever found against the authors of his death. It furnishes a notable illustration of the fickleness of popular favour or disfavour, that within the last few weeks the same democratic party of Portland, whose members in 1855 were supposed to be most hostile to Neal Dow and his temperance views, have nominated him for mayor of the same city, although he has not himself changed his sentiments on the liquor question which caused the riot of 1855.

These principles were frequently reaffirmed during the last thirty years, which period we pass over, in order to present a recent instance, of very great importance, which clearly demonstrates that the sound and salutary doctrines of the common law have not been emasculated of their strength and vigour by any supposed freedom or latitude in American life.

(4) During the winter of 1885-6, and for some time previous, great excitement existed among the working-men of Chicago, in the state of Illinois, and some other places, in their efforts to compel employers to introduce eight hours as a day's labour. Organizations were established for the overthrow of private property, and the holding of all capital in common. Inflammatory addresses were made, and appeals published by the leaders clearly advising the use of force and violence to accomplish a social revolution, even to taking the life of policemen and others who were opposed to their views. The excitement on both sides ran very high. On the 4th of May,

1886, a public meeting was held in Chicago by the working-men and socialists, for which preparations had long been making to resort to the extremest measures should they be interrupted by the police. This meeting was addressed by three persons named Spies, Parsons, and Fielden, each of whom had before advised violent and even bloody measures. About half-past ten in the evening, while Fielden was speaking, a band of policemen marched into the crowd and ordered the meeting to disperse. The moment the order was given some one in the crowd threw a dynamite bomb among the policemen, which exploded and instantly killed one of the policemen named Degan. Pistol shots immediately followed, and six more policemen fell, and sixty others were seriously wounded. *It was not known who threw the bomb which caused the death of Degan, but eight of the prominent men among them, including the above-named, were indicted and convicted of his murder. The indictment included one Lingg, the maker of the bomb, and others who were not proved to have been actually present at the meeting of May 4th, but were shown to be in full sympathy with its objects, and to have clearly advised force and violence on this occasion. The unlawfulness of the assembly was clearly established; the right of the policemen to interrupt it could not be doubted; their own demeanour was unexceptionable, and the deadly attack followed instantly upon their order to disperse. The principles before laid down in this article were assumed as undisputable, and the main struggle was whether the evidence was sufficient as matter of fact to connect the particular persons indicted with the murder of Degan, but the conviction of the whole eight was sustained by the Supreme Court of Illinois, and afterward by the Supreme Court of the United States at Washington. One of the guilty parties committed suicide in prison, three were confined in the state penitentiary, and four were executed. This remarkable trial is called 'The Anarchists' Case.'*

More instances might be added, but sufficient have been given to show that notwithstanding an apparent unconcern in our community at much rash and even desperate conduct on the part of lawless men, yet when the American people are fairly aroused they fully enforce the maxim *salus populi suprema lex*.

EDMUND H. BENNETT.

EARLY ENGLISH LAND TENURES.

I. MR. VINOGRADOFF'S WORK¹.

WITHIN the last few years a new theory on the origin and growth of village communities has been produced as well in England as in America and France. Messrs. Seeböhm, Ross, and Fustel de Coulanges have tried to establish the fact that communal ownership of land is not at all the archaic institution it was generally supposed to be. It has been maintained that it dates only from the period when the manorial system was already operative; that serfdom has been its chief creator; and that free village communities were totally unknown until comparatively recent times.

In its general lines, the new explanation given to the origin of village communities was but the revival of the well-known theory of the French and German 'feudistes,' who, trying to define the mutual relations of landlord and tenant as to the use of common pasture and wood, ascribed to the manor the exclusive ownership of the soil, the tenants possessing no other rights on it but those created by the good-will of the landlord, by his sufferance, or by covenant.

Thirty years ago a Russian scholar of great renown, Chicherin, of Moscow, tried to apply the same theory to the history of the Russian 'Mir,' but he failed, and, until quite recently, nobody expressed any doubt as to the remote antiquity of the present system of peasant ownership in Russia.

As soon as the views of Seeböhm and Fustel de Coulanges were published, Russian historians and lawyers felt bound to convince themselves how far these views were in accordance with documentary information.

Hence a series of articles and monographs, among which the work of Professor Vinogradoff is, without doubt, the most important.

I have much pleasure in saying that the general conclusions to which the author has arrived plead in favour of the view taken by Russian historians as to the origin of the 'Mir.' Mr. Vinogradoff expresses no doubt as to the existence of free communes long

¹ *Inquiries into the Social History of Mediæval England.* By Paul Vinogradoff. Petersburg, 1887.

before the creation of the manor, the class of freemen being preserved during whole centuries not only in the Danish provinces, where they are known under the name of sokmen, but also in other parts of England, where the terminology used by Domesday Book might easily induce the scholar to take them for a servile class. He also rejects every relation between the open-field system and that of cultivating the ground in common, the latter being totally unknown to the Anglo-Saxons. Once more in accordance with the Russian historical school, he attributes the origin of the 'virgate' system to the general desire of equalising the shares possessed by each household in the common fields, with regard to the quality of ground and the advantages of its situation.

Mr. Vinogradoff has made great use of the rentals and cartularies of the thirteenth century, as also of the court and hundred rolls, and the inquisitions and partial surveys that followed the composition of Domesday Book. He has minutely studied Anglo-Saxon laws and charters, and the works of the early English lawyers, especially Bracton, whose note-book he was fortunate enough to identify.

Beginning with the period on which he has found the greatest amount of information, I mean the thirteenth century, he gives a lively picture of the different classes of society and of the agrarian system of the country. This study induces him to point out the multifarious survivals of the class of free-born tenants, of whose origin and history he makes a detailed investigation in his following chapters. Among these survivals preserved by cartularies, rentals and inquisitions, I may first mention the so-called 'homines de antiquo dominico.' They appear in Bracton as an exception to the general rule, by which the lord could take away the ground possessed by the peasant, or augment the amount of his payments. These tenants could not indeed sue in the king's court, but in the court which he held, not as king but as lord, they could maintain their rights by the 'parvum breve de recto secundum consuetudinem manerii,' being thus clearly distinguished from other classes of *villani*.

In a like category of freemen are also, 1st, the so-called 'radmen,' 'radulf,' or 'rodchenistri' mentioned in the Black Book of Peterborough, who had no other duties to perform than to lend their ploughs to the manorial lord and attend him with their horses on several specially defined occasions; 2nd, the 'drengs' of the Boldon Book, whose character is very near to that of the radmen; 3rd, the 'hundredarii' or villeins, whose sole obligation was to be present at the meetings of the hundred courts; 4th, the

villeins of the county of Kent, to whom the cartularies of the thirteenth century apply the following rules: '*Dominus non debet aliquem operarium injuste et sine iudicio a terra sua ejicere*;' '*Dominus non ponet eos ad operam sine consensu eorundem*' (Rochester Cartulary); which means that the villeins of Kent possessed exactly the same rights as the '*homines de antiquo dominico*,' paid no other rents but those established by custom or agreement, and defended their rights in the soil by suit in the manorial court; 5th, and last, the different kinds of socmen, of whom the Year-books of Edward I speak as of persons '*statu liberi*'¹, who could not be removed from the ground or compelled to pay more or other rents than those fixed by agreement or custom, their obligations to the manorial lord being of the same kind as those of the '*libere tenentes*' or freemen.

Mr. Vinogradoff is therefore warranted in saying in the conclusion of the first chapter of his book, that inquiry into the social conditions of the different classes of the English peasantry during the thirteenth century leaves no doubt as to the existence in its ranks of a considerable number of free elements, too powerful to be overturned by the might of feudal barons or the legal subtleties of lawyers.

Mr. Vinogradoff next enters into a detailed discussion of the agrarian system of the thirteenth century, with the purpose of discovering the survivals of a more ancient system of landholding than that represented by Mr. Seebohm under the name of the '*virgate*' system. He states incidentally that the two-fields system (contrary to the opinion of Nasse and in accordance with that expressed by Thorold Rogers) prevailed in England during the greater part of the thirteenth century, and then gives his opinion as to the chief reason why the lands belonging to the same household were scattered over the whole area of the village intermixed with those of the neighbours. He thinks it is for no other purpose but to equalize the shares of the different households, that an equal access was given to the enjoyment of all the fields composing the village area, these fields widely differing one from the other as to the richness of soil and the advantages of situation. By two or three instances, borrowed from monastic manuscripts, he tries to make the reader understand the way in which this equality in the enjoyment of agricultural commodities was really achieved and the extraordinary subdivision of shares which was the result. In complete disagreement with Mr. Seebohm, Professor Vinogradoff tries to establish that the '*hides*,' the '*virgates*' and the '*bovates*'

¹ Bracton's use of this term is different.

were nothing else but fiscal units, and that the real distribution of the ground in the agrarian community did not correspond on the whole with the description given in the surveys. When these last documents mention the fact of such or such manor containing so many hides or virgates 'de ware' or 'ad invariam,' they intend only to say that the manor has to pay to the Crown so many shares. ('Wara' meaning the same as the German 'Wehre,' the expression 'so many hides or virgates' is to be translated as so many shares that you have to answer for.)

I think that, on this point, Professor Vinogradoff is quite right and that the documents are in accordance with his view. How could we explain otherwise the fact that certain cartularies, and among others the cartulary of Ramsay, sometimes mention the fact that the same manor contains a different number of hides, so many hides answering to the king and so many to the abbot? Take for instance the following text: 'Villata defendit versus regem pro 10 hydis et versus abbatem pro 11 hydis et dimidia' (Ramsay Cartulary, Rolls S. 473). How is it to be understood, unless we agree with Mr. Vinogradoff that the agricultural divisions of a manor did not always correspond with the fiscal divisions, and that therefore the villeins had to pay rent for a greater or smaller number of shares, as the one mentioned in the fiscal survey? (p. 122).

'The virgate system,' judiciously observes the author, 'has been the starting-point for large and very audacious theories.' The fact that parcels constituting one single virgate were scattered over the whole area of a village finds, according to Mr. Seebohm, its explanation in the method of allotting to different households greater or smaller shares in each of the cultivated fields, according to the number of oxen contributed by each to the common work of ploughing. From the time of the Anglo-Saxons, and, to judge by the instances of the Welsh and Irish agricultural arrangements, even in the old British days, the soil of England has been cultivated as a rule by large and heavy ploughs. Each of them was drawn by eight oxen, a number much too large to be owned by every one of the household. The result of it was, that peasant families were obliged to combine their forces to cultivate their ground. This very ingenious theory is directly contradicted, as Mr. Vinogradoff informs us, by the following facts. First of all, nothing like cultivation in common is to be found either in Russia or on the whole European continent. On the other hand, Anglo-Saxon documents mention no other ploughs but those drawn by one pair of oxen, and even in later days the system of large and heavy ploughs appears to be in use only on the 'demesne' land of the manor, the ploughs of the

villeins requiring but the half of that number¹. Under such circumstances, the theory of Mr. Seeböhm can hardly be maintained. But if so, we do not see how the 'gemenglage' of the fields, to employ a well-known German expression, can be explained otherwise than by reference to the necessity of equalizing the economical advantages of each of the households belonging to the same village community.

Mr. Vinogradoff concludes this most interesting account of the agrarian system of mediæval England by a minute picture of the different modes of communal ownership in meadow-lands, and a detailed description of all the agricultural works that the villein had to perform on the demesne lands of the manor, as also of the different rents he paid to the landlord. What gives a special value to this part of the work is the great amount of information that the author has accumulated out of manuscripts belonging to the British Museum, the Record Office, and the Bodleian Library. Having worked through the greater part of the rentals and cartularies accessible to the public, he has been able to find the key of more than one dark question. Specialists will be most interested in the explanation he gives to such terms as 'molmen,' 'chesland,' 'lodland,' 'serland,' 'unlawenerthe,' &c., terms the meaning of which (as far as I know) is still a matter of controversy.

After a general description of the economical and social conditions of the country people, Mr. Vinogradoff enters into details as to the constituent parts of a manor. Mr. Seeböhm has tried to establish that the manor contained only two sorts of lands—the land of the villeins or serfs, and the land of the lord, the so-called 'inland.' Part of the last could be given out to free tenants. Hence the 'libere tenentes' mentioned by rentals and inquisitions. The liberation of the serfs from their agricultural obligations conduced incidentally to the same result. At all events, 'libere tenentes' have not, according to Mr. Seeböhm, any land of their own in the manorial arrangements of mediæval England; they possess some parcels of ground, but their possessions are inconsiderable as compared with the villein tenements held in virgates. Such is not the opinion of Professor Vinogradoff, according to whom the land of the manor was divided as a rule into three different parts, the part of the lord, the part of the villeins, and the part of the free tenants: these last, instead of owning exclusively small parcels, were in possession of half and entire virgates, sometimes of whole hides, and their holdings were arranged according to the same virgate system

¹ In the lately published *Burton Cartulary* (Collections for Hist. of Staffordshire, vol. 5) there is repeated mention of '*aratra fortissima in dominio*.'—ED.

which was applied to the tenures of the villeins¹. Several instances occur in which no villeins are to be found among the inhabitants of the manor, their place being taken by free tenants. Such is the case of the manor of Kenesworth, mentioned by the *Domesday of St. Paul*.

Where free tenants are mentioned side by side with villeins, their rights to use the common pasture ground are regulated by the same rules as those of their servile neighbours. All these facts, according to Mr. Vinogradoff, point to the conclusion that, instead of being an accidental and posterior element in the population of a township, free tenants belong to its earlier constituency.

Although I completely agree with the opinion expressed by Mr. Vinogradoff as to the failure of Mr. Seebohm's theory, I will venture some criticisms concerning the general method followed by the Russian author.

This method has been imposed on him to a certain extent by the way in which Mr. Seebohm has arranged the materials of his ingenious work. Both scholars begin with comparatively recent times, and, having ascertained the existence of certain survivals of a more remote period, ascend to earlier epochs. Every time when a certain institution appears to be archaic, the Russian author is inclined to give it an Anglo-Saxon origin. The English scholar goes one or two steps farther back, and speaks of Roman and Celtic influences.

Both seem to ignore that among other influences one, not so far remote, has to be taken into account. It is the influence of the economical arrangements and legal institutions of Normandy. The fact that terms like 'villani' and 'servi,' 'dimidii villani,' and 'villani plenarii' were used in the Duchy many decades earlier than in the British island, ought of itself to have attracted their attention to the necessity of being very cautious in attributing a specially Saxon, Roman, or Celtic origin to the institutions and customs they deal with. If scholars of such deep knowledge as Mr. Brunner have succeeded in the establishment of this truth, that such a characteristic feature of English institutions as the 'Trial by Jury' has a Norman origin, it is not a matter of pure fancy to ask oneself if the system of agriculture and the social arrangements of the country from which came the overthrow of the Anglo-Saxon kingdom have not exercised a certain influence on the system of landholding and the domestic economy of the centuries closely following the Conquest.

The reader will remember the prominent part which the so-called

¹ Extant maps made in the late sixteenth and early seventeenth century tend to confirm this.—ED.

'villani de antiquo dominico' play in Mr. Vinogradoff's theory of the antiquity of free-born tenants. Being in full possession of their ground, such villeins had, as we have seen, the right of pleading against a lord who would either dismiss them from their tenures or alter the conditions on which they were admitted to hold their shares. And what alone is peculiar to them, they had only to show the fact that such was their situation at the time of the Conquest to have all their claims recognised by the manorial court. Mr. Vinogradoff finds no objection to the idea that such privileges point to their character of free tenants, if not after, at all events before, the Conquest.

He does not ask himself if the fact of those tenants occupying exclusively ancient demesne lands, recognised as such at the time of the Conquest, is not a direct inducement to search for a Norman origin to their exceptional privileges. Such is nevertheless the case, and when we read in the legal fragments supposed to be the laws of the Conqueror, '*Cil qui cultivent la terre ne deit l'un travailler se de lour droite cense, noun le leist a seignurage de partir les cultivurs de lur terre pur tant cum il pussent le dreit service faire,*' and compare this statement with the legal position of the villeins of Normandy, so far as it is known from the '*tres ancienne coutume de Normandie,*' we shall certainly perceive that the right to defend their tenures and to maintain without alteration their previous obligations to the landlord recognised by the villeins in ancient demesne lands, has no other than a Norman origin. The old '*coutume*' of Normandy plainly says that no landlord has the right to dismiss the villein from his land or to alter the conditions of his tenure. Is it not very likely that at one time Norman potentates had followed towards the English tenants of their demesnes the same course of dealing that was imposed on them by the custom of their native country? On this view, the privileges enjoyed by the villeins of the ancient demesne are not to be cited in favour of the antiquity of free-born tenants.

I should also like to see some English scholar engaged in a minute investigation of the agricultural arrangements of Normandy as they are stated by old cartularies, amongst others that of the Monastery of Holy Trinity at Caen (12th century, Bibl. Nat. fonds lat. N. 5650). The Anglo-Saxon origin of the large ploughs or *carucae* being necessarily rejected, on account of its complete disaccord with documentary information and ploughs of seven and eight oxen known under the name of *carucae* occurring in Norman manuscripts of the twelfth century (the cartulary just named amongst others), it is very likely that the Norman origin of the *caruca* would become an established fact, so much more so as Domesday

itself speaks of the *carucata* as a Norman land-measure (Domesday, i. 162 a: '50 carucatas sicut fit in Normania').

The third and fourth chapters of Mr. Vinogradoff's book (which constitute but the third part of the whole) treat at length of the social and agricultural condition of the English peasantry under the Norman and Anglo-Saxon kings. Recent investigations of the Domesday Survey have been taken into account, but a great deal of original research has also been directly performed by the author.

Within my present limits I cannot give a detailed account of the last chapters of Mr. Vinogradoff's book. Without giving the author's arguments, I will only mention the leading ideas of this part of his work. Mr. Vinogradoff enters at great length on the question whether the agricultural measures of Domesday, such as the hide, the carucate, and the virgate, represent the real state of things, or are only to be considered as fiscal divisions very like the 'souls' of the Russian census before the abolition of serfdom. Citing a great number of instances where local agricultural arrangements did not correspond to the description given to them by Domesday, the author concludes in favour of the exclusively fiscal character of the terms on which Mr. Seeböhm has built all his theory of the village communities under the Norman kings. But if so, no conclusions as to the system of landholding are to be arrived at by studying the methods in which the land was divided by the compilers of Domesday for purposes of taxation. Of much greater importance are the hints which the great census of William the Conqueror contains as to the social divisions of the people. The first conclusion they impose on us is the recognition of the considerable number of freemen scattered all over England, not only in Kent or the Danish provinces, but also in the southern and western counties.

The 'alodiarii' of Kent, Sussex, and Berkshire, the 'drengs' of Lancashire, the 'lagmen' of Lincoln, the 'sokmen' of the Danish provinces, the 'radmen' and the 'vavassores,' are but different names of the same class of freemen. If sokmen are not to be found in the western counties, the reason of it is no other than that the compilers of Domesday employed totally different names, and amongst others the one of villeins, to designate persons of free blood¹. The considerable number of freemen militates against the idea of an exclusively servile village community. The scanty information contained in Domesday as to common pastures and meadows under the run-rig system, applies as well to servile as to

¹ In the French text of the laws of William the Conqueror, 'sokmen' is rendered by the French word 'villein.'

free communes. But if free peasants are still to be discovered (even under the Norman kings), there may be no doubt that the process of feudalisation which had already begun in the ninth and tenth centuries was highly strengthened by the Conquest, and that 'commendations,' very frequent during the eleventh and twelfth centuries, rapidly limited the number of free tenants. This is the conclusion to which we arrive by a careful study not only of Domesday book, but also of the local surveys of the thirteenth century, the Black Book of Peterborough and the Boldon Book.

The chapter on the Anglo-Saxon period contains a very able discussion of the social condition of the *ceorls*, whom Mr. Vinogradoff considers to be freemen of very small estates. The reasons of their personal subjection to the proprietors of large estates and of the process of feudalisation of their lands are considered at length.

The general impression obtained by reading the pages in which the subject is treated is that Anglo-Saxon England underwent the same process of interior development which was familiar to Continental Europe, and that Palgrave was right when he spoke of feudalism as being established long before the Conquest.

As to the system of landholding, Mr. Vinogradoff is of opinion that it can be reduced to two distinct forms only, the *folcland* and *bocland*. He has no difficulty in proving that the latter being of a more recent origin, the oldest method of landholding among the Saxons of England was the *folcland*. Although Mr. Vinogradoff agrees in this point with Kemble, the explanation he gives of the character of the *folcland* is, as far as I know, an original one. He considers it to be, like the *gentile land*, subject to alienation only with the consent of the blood relationship. It is out of this *gentile ownership* that the free village community is supposed to have developed itself. Now, this seems to me the weak point of Mr. Vinogradoff's excellent book. First of all, the definition the author gives to the *folcland* is contradicted by the well-known fact that the king disposed of it with the advice of the *Witenagemot*. It does not agree with the precise statement of Beda, contained in his letter to Egbert (a 734), that the kings disposed of the *folcland* as a sort of remuneration for military service. On the other hand, the reduction of all the species of landed property to the *folcland* and *bocland* leaves out of account the existence of such facts as the inheritance of certain lands from 'propinqui,' their alienation 'cum recto consilio propinquorum,' and the power of devising them 'post se suae propinquitatis homini cui ipse voluerit.' It is only by the confusion of the so-called 'yerf-land' or *hereditas* with the *folcland* that Mr. Vinogradoff has

been able to come to the extraordinary conclusion that all the land of England was previously folcland. We must wait for better information before we depart from the theory of Maurer about the four different modes of land-ownership in Saxon England, especially with the limitations and distinctions given to it by Mr. Frederick Pollock. In this scheme the folcland is but the 'ager publicus,' not to be confounded with common lands; the 'yerf-land' is the 'terra a viatica' of the *lex Ripuariorum*, the bocland is the 'acquisitum' of continental Germans.

I do not think fit to conclude this paper by any general eulogy of the learned work of Mr. Vinogradoff. The account I have given will, I hope, leave no doubt as to the necessity of making it accessible as soon as possible to English readers and English critics.

MAXIME KOVALEVSKY.

EARLY ENGLISH LAND TENURES.

II. DOMESDAY STUDIES¹.

IN an age of centenaries it was probably inevitable that the eight-hundredth anniversary of the completion of the Domesday Survey should be taken as the opportunity for a public celebration, and it is now safe to congratulate the Royal Historical Society on the success which attended their experiment in 1886, and upon those literary results of their undertaking of which the first instalment has now been edited by their learned Secretary. Although William the Conqueror has now been formally enrolled among English statesmen, so far at least as that distinction can be conferred by the historical biographer, there might still have been a fatal touch of the ludicrous about any proposal to mark with popular applause the recurrence of the date of the dreadful fight at Senlac, or the completion with fire and sword of the dismal story of the Conquest. The disappearance of the Norman element from our society, and the death of feudalism and servitude, may make us indifferent to the sufferings of our English ancestors, and ready even to acknowledge that the fate which overtook them was in reality a blessing in disguise; but there is, nevertheless, something distasteful in the idea of rejoicing, even after eight centuries, in the details of the national downfall and the wholesale degradation of the English gentry and peasantry. Why then, it may be asked, should we have gone out of our way to celebrate the making of 'the great Rate-book,' designed as it must have been to consolidate the results of the Conquest, the book of which our old chronicler complained, that so very narrowly the king caused it to be traced out that there was not a hide or yard of land, 'nor even (it is shame to tell, though it seemed to him no shame to do) an ox or cow or swine was left that was not set down in his writ'? We can only answer that such remarks would appear to be just, if the Survey were only viewed as a monument of the actual Conquest, but that the whole course of the proceedings at the late Commemoration, and even perhaps the abstinence of the learned societies of Normandy and Scandinavia from taking any prominent part therein, show that this 'incomparable record,' to use Mr. Hallam's phrase, was studied and regarded throughout from an English point of

¹ Domesday Studies. Being the papers read at the meetings of the Domesday Commemoration, 1886. Edited by P. E. Dove. Longmans. 1888. Vol. I.

view; it was in fact treated as standing quite apart from the tale of Norman exactions, and as being a help towards elucidating the phases of our social history and illustrating the growth of the English Law.

A scholarly essay by Mr. Stuart Moore on the study of Domesday Book serves as a general introduction to the subjects with which this volume is concerned. He brings out very clearly the Conqueror's design in causing the Survey to be framed, and the invaluable help which the returns must have afforded in every department of the State. He justly regards the record 'as a great Rate-book, and not as a Survey of Extent.' The land-tax, on which the defence of the realm depended, was very irregularly collected 'upon an old and uncorrected assessment.' It fell heavily on the poorer tenants, while the Church and the nobility had obtained unfair and even enormous exemptions. The measures of land on which the tax was imposed varied according to local custom in every part of the country, while large tracts, especially in the West of England, had never been measured for purposes of taxation at all. The king determined to ascertain with respect to every estate in the country the old assessment and annual value, the value at the date of the enquiry, and the best means of framing a new assessment on the actual rateable value. He seems to have adopted the method best suited for a purely agricultural country, cultivated, (as England was then,) on a common-field system, with a two-course or three-course rotation of crops according to the usage of the district and the capability of the soil. The Commissioners were directed to ascertain by local enquiry the number of plough-teams which could profitably be employed on each estate and the number actually employed, with other particulars showing the value of the estate in the reign of King Edward, at the date of the Conqueror's grant, and at the date of the Survey being made. Among these particulars were included mills and fisheries, meadows, woods and pastures, and the live stock found on the demesnes; but this last item was omitted when the full return was made up, except in the counties of Norfolk, Suffolk, and Essex. The valuation was based in all cases on the sworn testimony of the tenants and of the neighbours assembled in the Hundred Court. We must agree with Mr. Moore that the proposal for assessment by the number of plough-teams was a fair and equal tax on the productive powers of the estate. Putting aside special items of profits, such as mills and underwoods, which were added to the valuation as they occurred, the taxation of the team would reach the value of the pasture on which the cattle were fed, the houses of the tenants, and all the remainder of the actual profits. We may refer for an

account of the incidental advantages of the Survey to the words in which Sir T. Duffus Hardy described what he held to be 'the greatest and most perfect experiment ever made by our own or any other people in economic legislation.' In a well-known passage of his work on the Materials for the History of Great Britain he speaks of Domesday as a register of the land and its holders, its extent, transfer and resources, its produce, 'its deprived and present possessors, the stock of the manors, the number of the tenants, cotters, slaves, and cattle employed upon them.' He points out how at the same time it was 'a military register, showing the national capabilities of defence, the position of the defenders and their relation to the Crown, a census of the population, a survey of their means of subsistence, their employments, and condition, a topographical and genealogical dictionary of all the great families in England, and a faultless record of real property, its incidences and distribution.' At first of course its value for fiscal purposes was paramount. By its aid the king might know how 'to live of his own,' and could tell what manors owed rent and lodging for the Court, what renders might be claimed from the sheriffs and farmers of the county-dues, what lands were held in chief and liable to the most onerous of the feudal incidents, and what value might be expected from a purchase or an escheat of baronies and manors in the hands of a subject. A passage quoted by Mr. Moore from the Register of Waltham Abbey shows how the national record might be useful from the subject's point of view. 'It can be seen by it,' says the monkish commentator, 'how the manors of this church were held before the Conquest and in the Conquest: it can also be seen how many hides there are in every manor, and if the king should wish to tallage his realm by hides, it can be seen at how many hides our manors are taxed, notwithstanding that by charter this church is free from hidage; it can also be seen what estates the tenants of our manors have of right; I do not say what estate they have at present, because by the patience and negligence of lords and bailiffs by long continuance they have now a freer estate, and may have other than they should have, to the disherison of the church and the peril of the souls of those who in such cases ought to have provided a speedy remedy.' As time went on the record became useful in other ways. The tenants in ancient demesne applied to it for proof of their privilege as servants of the Crown, and the serfs and labourers on many a private estate sought in vain among its entries for something to give legal validity to their ancient customs and traditions. When it was enacted that a prohibition should not lie for a demand of tithes for a new mill, Domesday Book became useful evidence of what mills were

ancient or not, and when the Fourth Lateran Council freed from tithe the demesne-lands of the four privileged Orders, a new value was found for the record in ascertaining the limits of the monastic exemption. It has been treated as the ultimate authority on many doubtful points of tenure, even in times when the judges could only certify that certain words were found in the book of which they could not pretend to understand the meaning. Its uses survive to the present day, though its practical value is somewhat impaired by the changes of name undergone by manors and hundreds in the long lapse of time since its completion. Mr. Moore points out that the Survey is frequently used to show the antiquity of particular manors or the relative position of superior and subordinate manors and in dealing with questions relating to mines and rights of common, and he adds that the record has been found and is likely to be found extremely useful in cases concerning fisheries. Add to all this that the great Survey is in the view of the law the unfailing authority for all points of historical importance relating to the Norman Conquest, and we shall be able to sympathise to a great extent, if not precisely to agree, with the enthusiastic judge who averred in the Case of Tanistry that '*notre record de Domesday est de melieur credit que toutes les forein discourses ou chronicles du monde.*'

Of the contemporary documents enough information remains to enable us to form a general idea of the methods pursued by the Domesday Commissioners; though the difficulties of the subject, arising from varieties in practice and difference of local circumstances, must always prevent us from gaining more than an approximate knowledge of the details. Several of these documents are discussed or fully referred to in the volume now before us, and a bibliography of the whole will be found in the popular account of Domesday Book by Mr. W. De Gray Birch, which has recently been published under the direction of the Society for promoting Christian Knowledge. The most important of these records are the Exeter Book and the 'Inquisitio Eliensis,' or survey of the lands of the monastery of Ely, both printed by Sir H. Ellis in the appendix to the folio edition of Domesday, and the 'Inquisitio Comitatus Cantabrigiensis,' which is bound up in the same volume of the Cottonian MSS. as the better-known Ely Inquest. This Cambridge survey is supposed to represent 'the original source from which the Exchequer Domesday of Cambridgeshire was compiled,' being a transcript at least as early as the reign of Henry II. of the returns made by the sworn surveyors throughout the county in obedience to the writ on which the Commission was founded. It was first published in 1876 by Mr. N. Hamilton of the British Museum; but Mr. Round

shows us in his essay on 'Danegeld and the Finance of Domesday' that its importance was recognised and great use made of its contents in a paper on the Danegeld by Mr. Carteret Webb, read before the Society of Antiquaries about the middle of the last century. The Ely Inquest is also important as containing not only a fuller account of the monastic estates than appears in the Exchequer record, but as being prefaced by a heading which purports to give the exact form of the articles of enquiry, so that we are able to arrive at a just idea of what the heads of the returns for other parts of the country must have been, making allowance for local differences in the forms of tenure and the division of various districts for purposes of assessment. The Exeter Book, which was exhibited at the late Commemoration, is so called because it now forms part of the collection of manuscripts at Exeter Cathedral. It has been made the subject of exhaustive commentary by Sir Henry Ellis, and was copiously used by Mr. Eyton in his learned essays on the interpretation of Domesday Book. Following Mr. Birch's interesting summary of its contents, we find that the main body of the manuscript consists of a survey of the five south-western counties, described in the same order as in the official record. 'It is supposed to contain, so far as it extends, an exact transcript of the original returns made by the Commissioners at the time of preparing the general survey, from which the Exchequer Domesday itself was afterwards digested and compiled;' and it is worth remarking that the accounts of the cattle and stock on the demesnes and other minute details follow the same forms as the Inquests for Cambridgeshire and the lands of Ely as well as of the surveys of Norfolk, Suffolk, and Essex, in the second volume of Domesday. This general account of the five counties is followed by three documents of the highest importance. These are three copies of the 'Inquisitio Geldi,' or taxation of the hundreds for the Danegeld imposed in the year 1084. The second of these copies is nearly the same as the first, with some marginal or interlinear additions; the third seems to be a corrected edition of the other two. The connection between the imposition of the Danegeld and the finance of Domesday is traced by Mr. Round with great learning and ingenuity. He adopts a distinction, first drawn by Mr. Carteret Webb, between the tributary Danegeld, which was used for buying off the Danish invaders, and the stipendiary Danegeld, which had its origin in 1012 when a Danish fleet entered into the English king's service and began to receive regular pay. This special tax appears to have been abolished in 1052, but was reimposed in 1084 and collected on the old lines of assessment. It seems probable that the inconvenience experienced in collecting the tax according to

the old method was the immediate occasion for making a new national survey. The Exeter Book also contains a number of summarised descriptions of the estates of various Abbeys and baronial tenants in the counties with which the record is concerned.

These documents relating to the Danegeld show that the assessment was measured by the number of hides in each hundred, subject to various exemptions. In the year 1084 the demesnes of the barons, as well as the lands of the king's husbandmen, were treated as free from liability; but Mr. Round adduces good reason for thinking that this was an exceptional incident, and that there is ground for believing that the barons had agreed to the imposition of an abnormally heavy tax on their inferior tenants in consideration of their own demesnes being exempted from payment. Notwithstanding all Mr. Eyton's efforts to produce a key to Domesday and to show the exactitude of its methods of mensuration, we cannot say exactly what average the hide represented. The hide does not seem to have been intended for a measure of superficial area; it rather stands for the lot or portion of land which usually went with a homestead, and its extent may have varied almost indefinitely according to the nature of the soil, the custom of the neighbourhood, or the terms of the original grant. When the hundreds were rated at so many hides apiece, it is natural to suppose that some standard of value would be adopted which would tend to uniformity of assessment, and we shall probably be safe in assuming that for the purposes of the Exchequer the hide and the customary ploughland of the district were treated as identical quantities. That some such process took place appears from the entries in Domesday Book as to certain lands never having been divided by the hide, or as to there being more hides in fact than were covered by the old assessment, or as to a ploughland or so many ploughlands remaining over which had not been included in the hides. In later times the name of the hide was certainly given to the ploughland of the southern counties. This ploughland is found in many instances to have contained 120 acres of arable: it must be remembered, however, that there was no rule confining it to any certain extent, and that it in fact represented the amount of land fixed by the custom of the district as the proper quantity for one team to plough in a year, with an indefinite addition of wood and pasture according to the needs of the tenant and the resources of the manor or township. Fleta tells us that in the time of Edward the First the ploughland in a common field contained 180 acres of arable if the field was cultivated on the three-course system, but 160 acres if it was worked on a two-course shift. This would seem to be a just calculation if we allow for a double ploughing of the fallow in each case, because the teams

would have the same amount of labour, though there would be a little less produce from the two-course field, which we may suppose to have been of a harder nature and a less productive quality.

The hide was the unit of assessment in the southern counties, with the exception of Norfolk and Suffolk, and of Kent, where the account was taken by the Suling, which may be described as a customary ploughland varying in size between 160 and 210 of the Kentish acres, measured by the sixteen-foot perch. In the northern counties (disregarding Northumberland and Durham and parts of Cumberland and Lancashire, as not having been comprised in the Domesday Survey) the districts called hundreds in the south were represented by wapentakes, themselves in some parts subdivided into smaller hundreds; the hide was replaced for purposes of taxation by a measure known as the carucate (divided into eight oxgangs or bovates), which in this connection must be regarded as a customary measure of Danish or Anglian origin, having no fixed relation to the ploughland, or land sufficient for one plough, by which the Domesday Commissioners estimated the productiveness of each estate. This part of the subject is very clearly explained by Mr. Round in his '*Notes on Domesday Measures of Land*,' which may be considered as being in many respects the most instructive of the essays in the volume before us.

Canon Isaac Taylor has collected a quantity of valuable evidence, based for the most part on actual maps and surveys, in order to show the connection of the entries in Domesday with the common-field system of husbandry. In the essay on the Ploughland and the Plough, he deals with the ancient unit of assessment in different parts of Yorkshire, where the number of taxable ploughlands is either the exact double or the exact equivalent of the number of ploughlands actually tilled or ready for tillage. He supposes that this variation indicates the existence in the several localities of townships cultivated on the three-course and two-course systems; and he suggests that the taxable unit may have been the land under tillage in each field, and not the area of the ploughland distributed in three or two fields as the custom of husbandry might require. The suggestion provides an ingenious answer to a problem of acknowledged obscurity; but there is great difficulty in supposing that any regular system of taxation could involve a double payment for a method of farming which produced little more profit than that which escaped with a single plough-tax. In any case the anomaly which he endeavours to explain is confined to a particular district, and it will probably be found that the theory will not solve the difficulties which have arisen as to the assessment of

other parts of the country. Canon Taylor deals in another essay with the origin of the Wapentake, which he believes to be the union of three Hundreds for the purposes of naval defence, just as the Hundred had always been treated as 'the unit for the military defence of the kingdom.' So far, however, as an opinion can be formed on such a difficult point, it would seem more probable that the divisions in question arose under different constitutional systems, and that Dr. Stubbs is right in affirming of the Wapentake, that 'no attempt can be made to account for its origin on the principle of symmetrical division.'

Mr. O. C. Pell's researches into the ancient measurements of land are already well known through the paper read by him in 1885 before the Cambridge Antiquarian Association. His learned essay in the volume before us deals with the same subject over an enlarged field of investigation, in which he will find few who have the knowledge or endurance to follow him. His treatise deals in reality with the whole theory and practice of measurements, and is only incidentally connected with the study of Domesday Book, although he has endeavoured to give a new view of the 'unit of assessment,' and to correlate the Hide with a 'pound-paying unit of land,' subdivided according to the various tribal and national divisions of the pound of silver. The most useful parts of his work for our present purpose are those in which he compares the entries in the Domesday Book with those which afterwards appear upon the Hundred Rolls in relation to the same estates.

Mr. Round criticises with some severity Mr. Seeborn's statement that 'the hide was used in the Survey exclusively as the ancient unit of assessment, while the actual extent of the manor was described in carucates.' But the statement seems in reality to be a true account of the matter, expressed in somewhat too general terms. What the Commissioners appear to have actually done was first to identify the estates in a particular Hundred, ascertaining which lands represented the Hides, (or the 'sulings' or 'carucates' in particular districts,) and then to determine the existing condition and value of the property, and to estimate from the evidence at their disposal the chances of improvement or deterioration. They had for this purpose to find out how many teams were in use, taking the demesnes and the tenancies as far as possible under separate heads, and to state how many teams in their opinion the arable area could properly sustain. Whether their estimates for the future were generally correct we have now little means of ascertaining, but it is certain from modern experience that many parts of the country were as badly cultivated in the reign of George the Third as they had been in the days of

Edward the Confessor. The survey of Minster in Thanet shows that '48 sulings' were liable to tax (the demesnes in the lord's hands being treated as exempt), and that there was arable sufficient in the Commissioners' view for 66 ploughs. Now in a deed of composition, made in the nineteenth year of Henry the Sixth between the Abbot of St. Augustine and his tenants, it appeared that the more ancient of the two measurements had remained in use with a very slight variation. This deed stated the customary extent of the 'suling' in Thanet to be 210 Kentish acres, and fixed the rent of $4\frac{2}{3}$ sulings of 'corn-gavel land,' and of $42\frac{1}{2}$ sulings and 38 acres of 'penny-gavel land,' representing between them the amount of arable cultivated at the Domesday Survey, without any increase in the number of ploughs. Instances of this kind could be produced from many parts of the country to show either that the Commissioners were estimating the different estates by a new Norman measure, or that they were making a calculation of a possible enlargement of the area of cultivation which never took effect in practice.

Canon Taylor calls attention, in an essay which will be widely read and highly appreciated, to the numerous survivals of the ancient system of agriculture which may still be observed in many lately-inclosed districts. 'Even where the land has long been inclosed and divided into separate holdings it is instructive to ride across the country, and observe how indelibly impressed on the soil by the ancient plough are the marks of those very divisions of the land which are recorded in the Domesday Survey.' He points out that the direction of the country lanes is often determined by the extent of the Domesday tillage; he observes 'queer rights of way' running at right angles to the roads along the mounds which once, as 'head-lands,' served to give access to the strips intermixed in the open fields; and he traces 'the curvature of the hedges,' which constantly follow the divisions of the oxgangs, and mostly correspond with the balks which once 'separated the ploughed strips of different owners.' The acre-strips, which had been originally straight, were, as he shows, bent in the course of centuries 'by the twist of the great eight-ox plough as the leading oxen were pulled round in preparation for the turn,' when they approached the end of the 'furlong' by which the longer side of the acre was usually measured. 'When the land is nearly level the rigs are S-shaped, with a curve at each end, but when the land is on a slope the rigs are often J-shaped with a curve at the bottom of the hill; if the hill was steep the plough went horizontally round it, forming those curious terraces on the hill-sides which are called "lincs" or "reeans".' The reader will recollect the picturesque account of

these terraces in Mr. Seeböhm's interesting book. Here we may conclude our general view of the first volume of essays. Mr. Hyde Clarke in his preface to the volume gives a full account of the Domesday Commemoration and a statement of the Committee's plans with regard to the preparation of this part of their work. He has added an instructive paper on the Turkish Survey of Hungary as compared with the system employed in the preparation of Domesday Book. This paper should be read in connection with Canon Taylor's more elaborate Essay on 'Survivals,' from which several of the foregoing extracts have been selected.

CHARLES ELTON.

THE BEATITUDE OF SEISIN. II.

BY a previous paper I have tried to draw attention to a great and very remarkable change which came over our law in the course of the later middle ages. Does the law protect possession against property? If we ask this question in Bracton's day, the answer must be: Yes, it protects possession, untitled and even vicious possession; if *O*, the owner, has been ousted by *P*, he must reeject *P* at once or not at all; should he do so after a brief delay, then *P* will bring the Novel Disseisin against him and will be put back into possession. But if we ask this question in the days of Littleton, the answer must be: No, the common law does not protect possession against ownership, except in those comparatively rare cases in which there has been a descent cast or a discontinuance, one of those acts in the law (their number is very small) which have the effect of tolling an entry. In the present paper I propose to collect some cases which illustrate this change, and then to say a little about its causes.

The fourteenth century produced no great text-writer, and we have therefore to rely upon the Year Books. It may be well therefore to observe that the Year Books are for this or any similar purpose very unsatisfactory material, because they are chiefly concerned with points of pleading, and by the middle of the fourteenth century pleadings had become very unreal things. Often the whole object of the defendant's pleader is delay, and the elaborate story that he tells has in all probability but little connexion with fact; he is just trying to puzzle the court and his adversary, and so no wonder if he puzzles us. A good selection from the Plea Rolls would be much better material; because at least occasionally we should find in it some real facts, some cases in which the assize was taken, in which special verdicts were returned and judgments given upon those verdicts. Even in the fourteenth, even in the fifteenth century, some real justice was done, but as it is we can hardly see the justice for the chicane.

It will be remembered that the Novel Disseisin lies if *B* unjustly and without a judgment has disseised *A* of his free tenement. The plaintiff therefore must have been 'seisitus de libero tenemento.' What does this imply? This is the question which successive generations have to answer. We have heard Bracton's answer, and Britton's. The latter requires that the plaintiff shall have had 'title de fraunc tenement,' but peaceable seisin for a long time after

a vicious entry is enough to give 'title de fraunc tenement'¹, that is to say the disseisor himself may acquire a possession protected against the disseisee. In the following notes of cases we may, I think, see this requirement of 'title' growing ever more and more stringent: the assize is gradually denied to any one who has himself been party to a disseisin, then to the alienee of a disseisor, then to the alienee of the alienee of a disseisor, until at last the cases in which the true owner is debarred from entering are quite few and very anomalous. All the while the theory, so far as there is one, remains this, that one who is 'in by title' (as contrasted with one who is 'in by tort') ought not to be ejected without process of law; but as to what 'title' is, we get no clear statement.

1292. (Y. B. 20 & 21 Edw. I, p. 221.) *M* is tenant for years, *A* tenant in fee; *M* enfeoffs *X*; *A* suffers *X* to remain in possession for a quarter of a year and then turns him out, the term not having yet expired; *X* brings the assize against *A* and succeeds. Otherwise would it have been if *A* had ejected *X* at once; as it is, *A* has suffered *X* to continue his seisin 'e entant granta le franc tenement estre le seu.'

1292. (Y. B. 20 & 21 Edw. I, p. 267.) *M* is tenant for years, *A* tenant in fee; *M* dies during the term; his wife *N* remains in possession for a quarter of a year, and then enfeoffs *X*, who remains in possession for a quarter of a year and is then ejected by *A*; *X* recovers seisin against *A* in an assize. It is said of *A* that 'par sa suffraunce demeyne si acrut franc tenement a le feffe.' Counsel for *A* says that if a termor alien in fee, yet even if the feoffee continue his estate for half a year, he may be ejected by the reversioner after the end of the term; 'quod non credo verum generaliter,' says the reporter.

1302. (Y. B. 30 & 31 Edw. I, p. 123.) Land is settled on husband and wife and the heirs of their bodies; they have a son *A*; the husband dies; the wife marries *X*; the wife dies; *X* claims curtesy and remains in possession for ten years; *A* ousts *X*; *X* recovers seisin against *A* in an assize. Even if *X* was not entitled to curtesy, still he entered claiming a freehold and ought not to have been ejected after ten years. The case is a good illustration of possessory procedure, for *A* at once brings a formedon against *X*. In this he fails; but only because the conditional gift was made before the Statute *De donis*, and so *X* really was entitled to curtesy.

1318. (Y. B. 11 Edw. II, f. 333-4.) It is said by counsel that if tenant for life alienates, and the reversioner does not assert his right for three or four years, the feoffee will be able to recover his seisin against him in an assize.

¹ Brit., vol. i. p. 310.

1327. (1 Ass. f. 2, pl. 13, and Y. B. 1 Edw. III, f. 17, 22, Trin. pl. 1, 10.) Land is recovered from *A* the true owner by one *X* whom *A* had ejected; such title as *X* had was derived (without any descent cast) from a grant made by *M* who had no title, but whom *A* had suffered to occupy the land; *A* had stood by while the land had been dealt with by *M* and persons claiming under *M*. Counsel urges that it is 'inconvenient' to award seisin to one who has no estate; but the judgment shows the true possessory spirit, 'quod licet *A* jus habeat ut videtur . . . tamen de facto suo proprio sine iudicio intrare non potuit; ideo *X* recuperet seisinam suam.' Brooke (Abrid. *Entre Congeable*, 48) notices that this case, and that last cited, imply a doctrine which in his day was no longer law. He rightly remarks that in cases of this date stress is laid on the fact that the person who has come to the land by a feoffment, will, in case he be ejected without action, lose the benefit of vouching his feoffor to warranty.

1334. (8 Ass. f. 17, pl. 25.) On the death of tenant for life, *M* who has no right enters and enfeoffs *X*; *A* who is the reversioner enters and is ousted by *X*; *A* recovers from *X* in an assize. The reporter calls on us to note that *X* was in by feoffment, but that *A* entered immediately on the livery of seisin.

1344. (17 Ass. f. 53, pl. 27; Y. B. 18 Edw. III, f. 35, Mich. pl. 16.) *M* is tenant for life, *A* has the remainder by fine; *M* enfeoffs *X* in fee; *M* dies; *A* may not enter on *X*.

1347. (21 Ass. f. 86, p. 23.) It was said that a man may enter on the feoffee of his disseisor even though the feoffee has continued his estate for ten years. 'Tamen quaere,' says the reporter.

1348. (22 Ass. f. 93, pl. 37.) *M* doweress, *A* heir; *M* demises to *X* for years and dies within the term; *X* holds on after the term; *A* may enter on *X*; but it is argued that he may not: the decision is based upon the fact that *X* was 'party to the tort.' Counsel for *X* says that after the death of *M* 'nous continuamus nostre possession ans et jours:' of which phrase notice must be taken hereafter.

1368. (Y. B. 42 Edw. III, f. 12, Pasch. pl. 18.) It seems assumed that a disseisee may enter on the alienee of a disseisor and on the alienee's alienee, but may not enter on the disseisor's heir; the question is raised, Why should this be so, as both heir and alienee are in by title?—but no answer is found.

1369. (43 Ass. f. 273, pl. 24.) Tenant in tail after possibility of issue extinct makes a feoffment in fee and dies; the reversioner may enter on the feoffee even after the lapse of six years; but the justices of assize had doubted this and adjourned the case to Westminster.

1369. (43 Ass. f. 280, pl. 45.) *A* tenant for life, *B* tenant in

remainder; *A* enfeoffs *X* in tail, remainder to *Y*; *X* dies without issue, *Y* enters; may *B* enter on *Y*? Yes, he may; but the case is discussed at length and the decision is put upon the ground that *Y* by entering has made himself a party to the forfeiture and a disseisor, and it still seems the opinion of the justices that one may not enter upon a person who is 'in by title.' Brooke (*Abrid. Entre Congeable*, 85) comments on this case thus, 'In those days one could not enter on him who was in by title, except in a special case (such as this was) where he was party to the tort, and one could not enter on one who was seised for a long time (*que fuit seisis ans et jours*), as appears frequently in the Book of Assizes. But otherwise in these days, for a man may enter on the twentieth alienee if there has been no descent to toll the entry, or something of the sort.'

1376. (Y. B. 50 Edw. III, f. 21, Mich. pl. 3.) *M* tenant for life; *A* reversioner; *M* enfeoffs *X* for life with remainder to *Y* in fee; *M* dies; *X* dies and *Y* enters; *A* or *A*'s heir may enter on *Y*. This is decided after much debate. It is however asserted by counsel that a reversioner can not enter on the feoffee of the feoffee of the tenant for life; at all events if he is to enter he must do so at once.

It seems unnecessary to trace this matter further, and we have come to the gap in our authorities due to the fact that no Year Books of Richard II's reign are yet in print. Before the death of his grandfather the common law seems to be taking its final form; possession is not protected against ownership except in certain very exceptional circumstances. We shall here do well to observe that Coke, like Brooke before him, well knew that there had been a change in the law. 'In ancient times,' he says, 'if the disseisor had been in long possession, the disseisee could not have entered upon him. Likewise the disseisee could not have entered upon the feoffee of the disseisor, if he had continued a yeare and a day in quiet possession. But the law is changed in both these cases, only the dying seised, being an act in law, doth hold at this day¹.' In the margin Coke refers to Bracton, Britton and Fleta, and to some of those cases in the Year Books which have already come before us.

Now as regards the owner's right to enter, we seem fully entitled to say that Coke had good warrant for his opinion that there had been a great change in the law, a change in favour of the owner; he had gained a right to enter in many cases in which it would formerly have been denied to him. But for the more precise rule that a disseisor's feoffee must not be disturbed after year and day, I have not been able to find any definite authority. I think that Coke may have taken it from a statement in Brooke's Abridge-

¹ Co. Lit. 237.

ment which has been mentioned above. The phrase however which Brooke uses is not 'an et jour,' but 'ans et jours,' and this I believe means vaguely 'a considerable time.' Coke's rule was not the rule of Bracton's day, for this was yet more favourable to possession. Still even in Bracton's time a year's possession was required of an intruder before he could claim protection against the remainderman, and it seems to me very possible that the gradual dissolution of the old law was checked for a moment at the point when protection was still given to a disseisor's feoffee if he had been in possession for year and day. There are certain reasons, which I hope to give on another occasion, for thinking that this may have been the case.

But now how are we to understand this episode in our legal history, this gradual victory of the rights of ownership over the rights given by possession? If, with Mr. Justice Holmes, we regard it as a mark of 'good sense' that a defendant in a possessory action should be allowed to rely on his title, then we may regard this as a gradual victory of good sense. But let us first note that after all the victory was but partial. It was the nineteenth century before a defendant became able to rely upon title, if by title he meant a right to *possess* the land. The only 'title' that even the fully developed common law enabled him to assert was a right to *enter upon* the land¹. In 1833 it was still possible that the person entitled to be in possession of land should have no right to enter upon it 'sine judicio;' if he entered and ousted the possessor, he would, I take it, have had no defence to an action of ejectment or to an assize². That in actual practice this happened very seldom was not due to the good sense of the common law, but to statutes which had helped the common law out of the bad mess into which it had got in Littleton's day. A statute of 1540 confined the doctrine of descents which toll entries within very narrow limits³. Another statute of the same year prevented a husband from effecting a 'discontinuance' of his wife's lands⁴. The dissolution of the monasteries and legislation as to other ecclesiastical corporations, left tenant in tail the one person who could 'discontinue the possession,' and this power of his became unimportant because generally he could do much more than 'discontinue the possession,' he could utterly bar his issue, remaindermen and reversioners⁵.

¹ 3 & 4 Will. IV, c. 27, s. 39.

² *Smith v. Tyndal*, 2 Salk, 685.

³ 32 Hen. VIII, c. 33.

⁴ 32 Hen. VIII, c. 28, s. 6.

⁵ Mr. M. M. Bigelow has kindly informed me that the old rule about descents tolling entries, as modified by the statute of 32 Hen. VIII, prevailed in Massachusetts until 1836, in Vermont until 1839, in New York until 1849. I know of no book in which the outlines of the ancient law of real property are so well stated as Stearns, *Real Actions*, a course of lectures delivered in the University of Harvard about seventy years ago. The learning of real actions was much better preserved in America than here, because

Now by way of explanation of what happened between Bracton's time and Littleton's, it might be suggested that in the course of civilization wrongful ejectments became much rarer, and that therefore it was needless, and if needless then unjust, to maintain the old possessory action in all its pristine rigour. But it may well be doubted whether during the period of which we speak wrongful ejectments became rarer. The fifteenth century was at least as lawless as the thirteenth. This was the time of forcible entries and private wars, of maintenance and champerty. 'In 1399,' says Dr. Stubbs, 'the commons petitioned against illegal usurpations of private property; the Paston Letters furnish abundant proof that this evil had not been put down at the accession of Henry VII¹.' 'Forcible entry and disseisin with violence,' says Mr. Plummer, 'were every-day occurrences, and were almost restored to the position of legal processes which they had held before the invention of the grand assize².' Not a little of the blame for this state of things should rest upon the judges who, by allowing the utmost license to mendacious pleadings, had made the assize of novel disseisin anything but the *festinum remedium* which it still was in the days of Edward I. That assize must have been very badly handled; otherwise the Statutes of Forcible Entry would never have been necessary. In 1381, 1391, 1402, 1429, statutes were made which ransack the whole armoury of the law for weapons against disseisors, indictments, summary convictions, imprisonment, ransom, actions of trespass, special assizes, restitution, treble damages, treble costs. Even under the strong rule of Henry VIII it was necessary to furbish up these weapons. So late as 1623 there is a new statute for the protection of possessors who are not freeholders³. It may I think be gathered from these statutes and the decisions upon them, that the true remedy for a crying evil was found in making forcible entry a crime. The judges refused a civil remedy under the statute of 1429 to a possessor forcibly ejected by an owner whose right of entry had not been tolled; although such a possessor could have obtained restitution in criminal proceedings⁴. Whether the makers of the statute meant this may perhaps be doubted; but at any rate the decision shows how far the judges had departed from Bracton's position; they could not conceive that a possessor with no title or some at least of the States had the good sense to reject our action of ejectment with its intricate fictions, and to renovate the old direct remedies.

¹ Stubbs, *Const. Hist.* vol. iii. p. 270.

² Fortescue on the Governance of England, Introduction, p. 21. Mr. Plummer, I imagine, intends to refer rather to the assize of novel disseisin than to the grand assize.

³ 5 Ric. II. stat. 1. c. 7; 15 Ric. II. c. 2; 4 Hen. IV. c. 8; 8 Hen. VI. c. 9; 23 Hen. VIII. c. 14; 31 Eliz. c. 11; 21 Jac. I. c. 15.

⁴ Y. B. 9 Hen. VI. f. 19 (Pasch. pl. 12) decided the year after the statute was passed. Bro. Abr. *Forcible Entry*, pl. 27.

bad title could be 'disseised' by a person who had good title, and whose right to enter had not been tolled by descent cast or discontinuance. 'Disseisin' in such a context had come to imply something more than dispossession of a possessor, something more than dispossession of a possessor who has colour of title; it had come almost to mean dispossession of one who has relatively good title by one who has relatively bad title.

It may be that for a long time past the judges had felt that there was some want of 'good sense' in allowing *A* to recover possession from *B*, when *B* was willing to prove that he had a right to be in possession; some want of good sense because this would be putting *A* into possession merely in order that a question might be raised in some future action, which might very well be decided once for all in the present. But then the judges of Bracton's day saw no want of good sense in this, so we have to account for the change of mind. What is more, we may never safely refer great changes in the common law directly and immediately to opinions as to what is politic or expedient, least of all changes which took place in the period of the Year Books. Judges and counsel talk little of public policy; 'Fiat justitia, ruat coelum,' is their maxim; the social fabric may fall in with a crash, but their legal logic must have its way. Thoughts of the common weal must be expressed in forensic terms, 'seisin' and 'freehold' and so forth, before they can influence decisions. To a full explanation of the process indicated by those notes of cases which I have given above we shall hardly at present attain; but a little may be done towards clearing the way for other investigators.

In the first place something may be learned from the history of the law touching the time within which an assize must be brought. It seems that from the first the Norman writ of novel disseisin, which probably we ought to regard as the parent, or perhaps elder sister, of our own, could only be brought by one who had been disseised since last August. Each harvest set a term of limitation running; if a man was disseised at harvest time he had a full year within which to complain; if he was disseised shortly before harvest, then he had but a much shorter time. Year and day seems regarded as the normal term of limitation, but it is assumed that harvest time is the great time for disseisins. This gives to the Norman law a curiously homely character¹. In England no such annual limitation was established. Glanvill tells us that the period within which an assize can be brought is fixed from time to time by royal ordinance. The writ that he gives mentions the king's last journey into Normandy, an event that

¹ Heusler, p. 373; Brunner, p. 329.

must have been quite recent¹. Such ordinances were issued after Glanvill's day; we find Richard's first and second coronations, John's coronation, John's return from Ireland, Henry's coronation, Henry's journey to Gascony, are chosen as limits behind which a plaintiff may not go. When this last event was chosen it was but seven years old or thereabouts². The Statute of Westminster I, while it altered the time for other writs, left this unaltered: so in 1275 it seems to have been considered that a disseisin committed five and forty years ago was yet 'novel.' This means a great change, but is little to what follows; for no other time was limited until the reign of Henry VIII, so that in 1540 a disseisin three hundred years old was still 'novel³.' Now this should be had in mind, for though in theory it may well be possible that an action shall be thoroughly and truly possessory, and yet be subject to no rule that limits a time within which it may be brought, still it would be difficult to maintain the theory in practice. If I be permitted to demand restitution of land on the ground that you ejected me eighty or even twenty years ago, whatever we may call this complaint, it will be difficult to think of it as other than a demand that you should restore to me what is mine, difficult to think of it as based not on proprietary right but on injured possession, and difficult because substantially unjust to prevent your pleading whatever title you may have.

We ought to look below this curious history to its cause, which is not to be found altogether in the remissness of parliament. In 1275 parliament in a splendid outburst of youthful vigour was beginning to overhaul the whole law of the land; and yet a term of more than forty years was not thought too long for the assize of novel disseisin. Ten years later the secret is revealed. 'Forasmuch,' says the Statute of Westminster II, 'as there is no writ in the Chancery whereby plaintiffs can have so speedy a remedy as by a writ of novel disseisin.' Here is a summary remedy for the recovery of land, why not extend its beneficent operation? Why insist that the defendant shall have obtained possession so very recently, or by what is technically called a disseisin? If we have come by a good form of action, why not use it? This seems the view of the matter taken by the parliaments of Edward I. A sensible, practical view it may be; but legal principle avenges itself. If we try to make our possessorium do the work of a petitorium, it will soon refuse to do its own proper work; questions of title will be raised in it and will be decided.

¹ Glanv. lib. 13, cap. 32.

² Stat. Merton, cap. 8; Ann Burton, p. 252; Bracton, f. 179.

³ Stat. 32 Hen. VIII. c. 2.

Thus the most elementary notions of the law are blurred. Take for instance the classification of actions as real and personal, or real, personal and mixed. This in all probability was not native in our law and was never thoroughly at home there. Bracton introduces it. He holds indeed that an action for goods cannot be *in rem*, because the defendant has the option of paying the value of the goods instead of surrendering them; but he knows too much of Roman law to call an action 'real' merely because the successful plaintiff will thereby obtain possession of a specific thing. The Novel Disseisin, for example, is *actio personalis*; it may be *rei persecutoria*, but it is *personalis*¹. So the cognate writ of intrusion is *omnino personalis*². So the *Quod permittat* is *potius personalis quam realis*³. With him the test is rather the nature of the mesne, than the nature of the final, process. If the mesne process is against the thing, if e.g. the land is seized into the king's hand, the action is real, but if, as in the assize of novel disseisin, the process is attachment, then the action is personal. The active party in such litigation is not a demandant, he is a plaintiff, he is not *petens*, but *quaerens*. This last distinction perdured to the end; it is a mistake to speak of a 'demandant' in an assize. But after a while an action becomes 'real' merely because land is obtained thereby, and it is 'mixed' if damages also can be obtained⁴. Indeed even an action on a covenant may be a real action⁵. Had Bracton been a pupil of Savigny he could not have stated more clearly than he has done, that the Novel Disseisin is a personal action founded on tort⁶. The mere change in terminology, a retrogressive change as it may seem to some, may be explained by the fact that our law became always more insular, our judges always more ignorant of any law but their own; but that the Novel Disseisin fell into the general mass of real actions requires some further explanation.

This we may find if we turn to another famous distinction, that between possessory and proprietary actions. Between the proprietary writ of right and the possessory assizes there grows up a large group of actions, the writs of entry. Of their history I hope to write a little on another occasion. Here it must be enough to say that in Bracton's view they are, with some exceptions, distinctly proprietary actions. In course of time however they come to be called possessory. This one fact by itself is enough to warn us that the distinction becomes exceedingly obscure. Now these actions became quite as easy as the assize;

¹ f. 164 b.² f. 161.³ f. 284 b.⁴ Lit. s. 492 and Coke's comment.⁵ The writ of covenant real, whereon fines were usually levied, was abolished in 1833 along with other 'real and mixed actions.' See Bl. Com., vol. iii. p. 157.⁶ Bract. f. 103 b, 104, 164 b.

indeed it would seem that they became even easier, for a particular form of writ of entry (the writ of entry in the nature of an assize, or writ in the quibus) came to be commonly used in the fifteenth century instead of the Novel Disseisin. As regards simplicity and dispatch, the equalising process seems to have been rather one whereby the possessorium was deteriorated than one whereby the petitorium was improved. So far as mere 'process' is concerned the Novel Disseisin must down to the very end, down to 1833, have been a fairly rapid action, quite as rapid I should think as the action of ejectment. Why it went out of use is no very easy question; but apparently the subtleties of pleaders 'feigned, dilatory and curious pleadings' worked its ruin¹. The formulation in the original writ of the question for the jurors, was a device only suitable to an age whose law was as yet but meagre. As such terms as 'freehold' and 'disseisin' become more and more technical, the pleader of one litigant becomes more and more anxious that the question so formulated shall not be answered, and the justices take that pleader's side, for they hold that matter of law is for the Court and only the purest fact for laymen. The pleadings in assizes become at least as complicated and 'colourable' as the pleadings in other actions, perhaps more complicated and 'colourable,' because there is a fixed question for the jurors which has to be evaded. And so the assizes fall into the ruck of 'real actions.' Now it is not inconceivable that a possessory action should be strictly possessory, although it is not distinguished from proprietary actions by a specially summary procedure. But that this should be so must imply a legal theory of possession and of the reasons for protecting it, fully developed and precisely defined. Such a theory our lawyers of the fourteenth century had not got, and the momentous contrasts in procedure were things of the past. It was easy in Henry II's time to distinguish the rapid possessory procedure in the king's court from that proprietary procedure in the feudal courts wherein the tenant after manifold essoins could always wage battle if he pleased. In Edward II's time, when normally all questions of fact (and no other questions) were tried by a jury, when there was as much pleading in an assize as in any other action, when there were writs of entry which some thought possessory and others proprietary, when there was hardly any 'real' action in which damages could not be recovered, no wonder that the theory of the Novel Disseisin was not maintained, no wonder that it refused any longer to protect possession against ownership, or only did so in a spasmodic, capricious, half-hearted way.

Coming a little nearer to our problem, we see that the process

¹ See Coke's Preface to 8 Rep.

which gradually extends the sphere of self-help allowed to the ousted owner begins by permitting him to enter, regardless of lapse of time, upon the person who has himself been guilty of a disseisin. Bracton, we have seen, had apparently inherited a set of ancient positive rules determining the time for reejectment; normally it must be accomplished within four days, but a longer time is allowed to an owner who is absent when the disseisin is committed. But he rationalizes these rules by speaking of patience, negligence and acquiescence. In this there is no harm, even on a very strict theory of possessory remedies, provided acquiescence in the mere physical fact of adverse possession be carefully distinguished from any such acquiescence as will serve to confer or extinguish proprietary rights. But even Bracton himself does not bring this out very clearly; a *longa et pacifica seisin* protects the possessor against the owner's self-help; a *longa et pacifica seisin* bars the owner from his action and acts as a *usucapio*¹. The old positive rules being rationalized away, such language becomes very dangerous. The problem then becomes this, What length of seisin will serve to confer a 'title de fraunc tenement,' 'an estate of freehold.' There is no answer ready; it is a matter for judicial discretion; the judges lean towards the owner; there is no longer a striking contrast between possessory and proprietary procedure to direct their thoughts; they no longer feel, what Bracton felt, that for an owner to take the law into his own hands, to make himself judge in his own cause, is a usurpation of judicial functions, a contempt of court; they no longer feel the force of the phrase, 'injuste quia sine iudicio.' The notion of acquiescence is an insecure foot-hold, and gradually it slips away. No distinction can be found between the acquiescence which bars entry, and the acquiescence, or rather lapse of time, which bars action. So on the disseisor himself the owner may always enter.

But cannot firm ground be found in the protection of titled possession? Let the owner enter on one who is 'in by tort,' but not on one who is 'in by title.' It seems that our law was arrested at this spot for a while. But really the ground is not firm. To protect possession as such even against ownership, may be wise; and to protect possession acquired by title and in good faith, may also be wise; but to require title and yet ask nothing as to good faith can hardly serve any useful purpose. Suppose that *A* has been disseised by *B*; we refuse to protect *B* against *A*'s self-help. Then *B* enfeoffs *C*; shall we protect *C* against *A*, and this without inquiring whether *C* took the feoffment in good faith? To do so is absurd; for if we do it every disseisor will

¹ See especially *f. 52*.

have a *C* ready to hand. Had a requirement of good faith been introduced, then indeed a halting-place might have been found. But this could not be done; a psychological investigation was beyond the means, beyond the ideas, of our law. 'The thought of man shall not be tried, for the devil himself knoweth not the thought of man.'

Then again reference must be made to a statute. The Novel Disseisin was so convenient a remedy that its scope was enlarged. The statute of Westminster II, as already said, informs us that 'there is no writ in the chancery whereby plaintiffs can have so speedy a remedy as by a writ of novel disseisin.' Therefore this writ is to be extended to cases in which as yet it has not lain. If a tenant for years or a guardian aliens in fee, both feoffor and feoffee are to be adjudged disseisors¹. It seems probable both from the words of the statute and from Bracton's text that before this act the feoffee was no disseisor, though I know that according to later opinion—at least according to the opinion of some later lawyers—this statute was made 'in affirmance of the common law.' But this only means that in course of time the same rule was applied to cases not within the very words of the clause: the feoffee of a tenant at will, or by suffrance, or by elegit, or statute merchant was held to be a disseisor². Such a feoffee therefore was not 'in by title.' This must have opened up the question, What then is title? since the mere fact that a person had come to the land by feoffment was inconclusive. For this question there was no easy answer, and we soon find that one who takes a feoffment even from a tenant for life, (a person who is seised,) is regarded as 'party to the tort.' It seems to me that the rule which treated a feoffment in fee made by a tenant for life as a forfeiture was not yet well settled in Bracton's day, and that as the law of forfeiture grew stricter the position of feoffees grew worse and worse. Then, as may be seen in some of the cases noted at the beginning of this paper, the question arises as to the feoffee of a feoffee. But no logical rest can be found; twenty feoffments may be made in one day, and the last feoffee will be just as guilty as the first. So as a general rule the feoffee has no more protection than the feoffor has; he is unprotected against the owner. The 'discontinuances' remain outstanding as exceptional cases. No forfeiture is involved in them; if a husband alienates his wife's land, this of course cannot be a forfeiture; husband and wife are too much one for that: if an abbot alienates the abbey lands, there is no one who can have any right to take the land from the feoffee so long as that abbot is abbot; as to the tenant in tail, it would have been very difficult to

¹ Stat. West. II. c. 25.

² 2 Inst. 412; compared with *ibid.* 154.

hold that by alienating he forfeited his estate to his own issue. So in these few quite exceptional cases the feoffee comes in without there being any disseisin or any forfeiture; here then the old rule still prevails, he has a seisin of freehold in which the law protects him even against the true owner.

The doctrine of descents cast is another relic. Blackstone seeks to account for the law's protection of the disseisor's heir by some ingenious arguments:—(1) the heir comes to the land 'by act of law, and not by his own act;' (2) 'the heir may not suddenly know the true state of his title;' (3) this rule was 'admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not by any mere entry of another be dispossessed of the lands whereof he died seised.' Such reasoning as this seems to me conspicuously absent in the Year Books. If Blackstone's object was to explain the history of the rule and not to find some excuse for retaining it in the eighteenth century, then he asked the wrong question; instead of inquiring 'Why is the disseisor's heir protected?' he should have inquired, 'Why is not the disseisor's feoffee protected; why is not the disseisor himself protected?' It seems to me that English law having once given up the attempt to protect mere possession against ownership, stumbled forward towards the 'good sense' (if such it be) of never giving any civil remedy against a person, who being entitled to possession, takes possession. But it knew not well whither it was going. For a long time, for a century and upwards, it had before it a vague idea that though mere possession is not to be protected against the owner, still innocent possession deserves protection. The disseisor's feoffee loses protection because in very many cases he is party to a forfeiture and a tort. On the other hand the heir enters innocently; death and descent cast are not wrongful acts; there is no fraud in entering upon that of which one's ancestor dies seised. The law demands innocence; but innocence it judges by rude external standards. To our minds of course the possessor, who of all others is best entitled to favour, is not the heir but 'the bonâ-fide purchaser for value' who has honestly but unfortunately bought a bad title. But an inquiry into good faith, a respect for valuable consideration, these do not belong to the law of the fourteenth century, and if we suppose ourselves unable to try the thought of man, then we shall think that the heir's position is stronger than that of the feoffee. Very probably the latter has been guilty of some tort, very possibly he is but a man of straw behind whom the disseisor himself is lurking; but the heir is presumably innocent, and undoubtedly he comes to the land by 'title.' If however we read Littleton's chapter on 'Descents which toll

Entries,' we shall hardly fail to observe that the protection which is still given when a descent has been cast is given very grudgingly; every sort of excuse seems accepted for allowing 'him that right hath' to enter upon what is his own. The rule which protects the heir looks as if it were being pared to the quick. It has become an isolated anomaly; that it did not disappear altogether may be in great measure due to Littleton's genius; a man of his ability had it in his power to stereotype the law at an evil moment. Then, as already said, Parliament came to the rescue and the tolling of an entry became an anomaly, and in actual practice a rare anomaly; but it was not until 1833 that the long experiment, the experiment of Henry Fitz Empress, was brought to a formal and final end. Practically for the last three hundred years and more, theoretically as well as practically for the last fifty years and more, we have had no action in which an ejected possessor could recover possession from the owner who ejected him: certainly this is a fact which deserves the consideration of all who are troubled with theories of possession¹.

F. W. MAITLAND.

¹ Since this article was in print, Mr. H. W. Elphinstone has suggested that the curious rule of Norman law which makes the last harvest a term of limitation is very intelligible if a system of common fields and common agriculture was prevalent: it is only at harvest time that an owner does any act which manifests an exclusive ownership.

RAILWAY MORTGAGES AND RECEIVER'S DEBTS IN THE UNITED STATES.

IN his preface to a work which is destined to be of high authority in the United States, and of interest to all investors in American railway securities, the author says, 'The law of Receivers is largely the growth of the last five-and-twenty years, and is moreover essentially American in its character and characteristics¹.' Had this remark been made concerning the chapter on Receiver's Certificates only, it would have been even less subject to exception than it is, for without doubt it is chiefly in the courts of that country, both State and Federal, that the once narrow rule which permitted limited expenditures for the care of the estate by a mortgagee in possession, or by a court, acting at the instance of a creditor, has been so expanded, that at the present time the holders of bonds of railway companies situated in those jurisdictions there, where the common-law title of a mortgagee and his right to possession after default have been superseded by the more modern notions, according to which he has merely an equitable lien upon the property in the nature of a chattel interest, are frequently obliged to incur an expenditure pending a foreclosure and sale wholly out of proportion to the benefits which have accrued to them from their investment.

In Mr. Beach's work he has written upon this subject with necessary conciseness, and it is proposed here to consider with more detail those cases in which property in the hands of a Receiver of a railway appointed at the instance of a bondholder, can be charged with the payment of claims of third persons, and to what extent the power of a Court of Equity can be exercised in this regard.

Generally speaking, all expenses which must be necessarily incurred for the conservation of the property will be charged upon it. Among them are fees of the receiver and his counsel, amounts laid out for repairs, or for betterments, when these are necessary; when the property consists in part of a business, payments for rentals, salaries of assistants, tools, office expenses—all these will be allowed, provided the Receiver has obtained sufficient general or specific authority from the court for the outlay. Such expenses impose an equitable lien upon the estate which, being incurred in

¹ Commentaries on the Law of Receivers. By Charles Fisk Beach, jr. New York: 1887.

preserving the property, will in certain cases be enforced as paramount to all others.

The theory upon which this rule is based is stated by Lord Justice Turner¹ to be that the Court represents the whole estate, and stands in the position of a trustee of it, and the person placed in charge is the paid agent of the Court to manage the estate in its hands. The moneys due him are moneys due to the Court itself, and when the Court has in its hands moneys belonging to the estate, on account of which it has made payments, it must have the right to repay itself its advances out of these moneys. This right, he says, has priority over the costs of suit even, for as to a fund in the hands of a trustee his expenses must be the first charge.

The most frequent illustration of this practice is that afforded by the American cases of railway administration through a receiver, and the incidental charge upon the property for the payment of receiver's debts, usually evidenced by certificates. A receiver's certificate is a promise to pay, out of the proceeds of the estate, and usually contains a covenant that the charge upon the estate is a first lien, paramount to all others, together with a reference to the decree which has authorised the issue and created the preference. Such certificates are not evidence of a debt of the railway corporation, but of the receiver solely, and the Court is pledged to devote the property in its possession or the proceeds, when it is disposed of, to their payment. This results from the fact that they are but a device for appropriating in advance a portion of the property, in order to enable the Court to save the remainder from waste.

The cases in which these preferential liens have been created are, *first*, those in which the claims of the creditors at large against the owner of the estate all stood upon an equal footing, there being no contract for security in favour of any creditor over another; and, *second*, cases where some contractual obligation, in the nature of a lien upon the property sought to be charged, was created before the debts arose for which the certificates were issued. These contractual obligations, the parties to which were the railway company, upon the one hand, and, upon the other, third parties, who often were wholly unconnected with the litigation, have usually taken the form of mortgages or trust deeds conveying both the railway property and its earnings to secure the payment of bonds issued by the company, and it is in reliance upon the lien created by the mortgage, which may at the time be paramount to all others, that the bonds are purchased.

It may again be observed that the debts evidenced by a receiver's certificate are, like those spoken of by Lord Justice Turner, debts of

¹ *Morrison v. Morrison*, 7 De G. M. & G. 226.

the receiver in his official capacity—that is to say, as an officer of the Court, and consequently are the obligations of the Court itself. In liquidating past due debts, or in creating new ones, by the issue of certificates, the Court can only act by virtue of the powers of conservation and administration to which reference has already been made. In the former of the two cases mentioned, where no contractual obligation will be dishonoured in their exercise, these powers are limited only by the exigencies of the situation. In the second case, the circumstance that the creation of a new lien in favour of a certificate holder, commits the Court to the disaffirmance of a prior obligation, leads to the inquiry, Whence is such power derived, and what, if any, are its limits? Although this subject, of the implied breach of contract by the aid of the Court, may not at first appear to be involved in a discussion of the administration of the estate, yet such a result may follow directly upon the principle adopted for the distribution of the proceeds as between the first lien holders and the new class of creditors.

We may notice further, as a preliminary question, the difference between those debts which find their first and only recognition in the final decree, when the estate is distributed, and those which are evidenced by the certificates. The former may include the expenses of the suit, together with disputed claims against the property, which are established by the decree itself. In the latter are included debts existing against the estate at the time the receiver took possession, the payment of which he has been directed by the Court to assume, because otherwise he might be hampered in carrying on his duties (as an illustration of which may be mentioned past due balances upon traffic agreements with other companies which are continued in force by the receiver), and debts incurred by him which the current earnings have not been sufficient to discharge. Obligations incurred for the purchase of supplies, such as new rails, are an illustration of these. The essential distinction between these two classes of debts is worthy of notice in another view. In the former case no action of the Court initiated by itself has increased the charges upon the estate; in the latter, the Court becoming a borrower of money has carried on its administration upon credit, with the result that having been compelled to rely upon individuals for the conduct of details, it has too often found that its delegation of power did not result beneficially to the parties concerned: to the bondholders, because the money borrowed or forborne must be first paid out of the proceeds of the sale; and to the corporation, because the benefits to its estate from the borrowing are by no means to be measured by the debt incurred, part of which may have been used for current expenses; and though part may

have been laid out in permanent improvements, yet at a forced sale the difficulty of realizing the amount so invested is manifest. Thus the principal of the debt has accumulated, however slightly the actual value of the property may have been enhanced.

The habit into which courts have fallen of imposing these forced loans upon the property of railroad companies is without doubt the product of an unbusinesslike system of corporate management, of which so many examples are found in America, where speculative methods upon the one hand are joined to a limited earning capacity upon the other, due to competition or to lack of patronage; and where extravagance in the creation of a bonded debt has entailed a burden far in excess of the income of the company. The inevitable result of this is a default in the payment of interest, but not until every available asset has been appropriated in a vain attempt to postpone it: so that when a court is called upon to intervene it happens in nine cases out of ten that no capital is found in the company's treasury with which to meet current engagements or to carry on the enterprise.

Under these circumstances two alternatives are presented for adoption¹. One is the old method usually applied to banking, insurance, and manufacturing companies, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will bring at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all persons having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim.

Notwithstanding that an eminent judge of the Sixth Circuit has declared in an Ohio case, 'That it is not a part of the duty of a court to run a railroad²,' yet doubtless no Court of Equity would consider that its duty either to the company or its creditors or to the public permitted a resort to the former alternative. Yet it is often a question whether that course, if followed, would not have been the wiser one. If in the famous case of the reorganisation of the West Shore Railroad Company the receivers had not continued to operate the road, the bondholders and other creditors would have been saved from an additional liability, for a deficiency in earnings over actual running expenses of a million dollars or more in a single year, which was met by the issue of certificates. But as a choice of the

¹ *Barton v. Barbour*, 104 U.S. 136.

² Judge Baxter.

lesser evil (says Mr. Justice Woods¹), if not of the most positive good, and generally of the latter also, it has come to be settled law that a Court of Equity may, and in most cases ought, to authorise its receiver of railway property to keep it in repair and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of a court to do this was expressly recognised in *Wallace v. Loomis*².

The reasons which have induced the adoption of this policy as the better one, will serve also to indicate with some clearness the extent of the powers possessed by the court to furnish means for carrying it forward.

As we have already noticed that the power of the court to use a portion of the estate or fund in its charge, whether railway property or otherwise, in order to preserve the remainder, is an inherent power, the question to be immediately considered is, whether in the case of a railroad its preservation cannot be better accomplished by keeping the property in use, and whether it is not rather the duty of the court to do so, even at some expense.

The general rule has been guardedly stated by the Supreme Court of Virginia as follows:—

‘A Court of Equity, having in charge the mortgaged property of a railroad company, is authorised to do all acts that may be necessary within its corporate power, to preserve the property and to give it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works, and franchises of the company. Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced³.’

As we shall see further on, cases have arisen in which the powers exerted by the courts have been far greater than those possessed by the corporation whose property was seized. Within the limits stated above, however, the reason most apparent for keeping the property in operation is an economical one. The best and cheapest mode of conserving a railroad may be by maintaining it in repair for use and running the trains. Its earnings depend of course upon its capacity for traffic and upon its good will and the regular patronage that it receives. Any interruption in its business, however temporary, where there were competing lines,

¹ *Barton v. Barbour*. ² 97 U.S. 146. ³ *Gibert v. Railway Co.*, 33 Grattan, 586.

might be followed by a serious diversion of freight and passengers, the consequences of which would be a great and permanent depreciation in the value of the property. Experience also shows that it is far better for property of this kind to be constantly used, watched, and repaired, when necessary, even at an expense somewhat in excess of the earnings, than for it to remain wholly idle.

In addition to this, the character of a railway company as a public institution; as the holder of a valuable franchise often exclusive in extent; as the recipient from the public of rights of way and other easements and privileges, which would become valueless except for such use; as a party to a contract that imposes upon it reciprocal obligations to carry out the purpose of its creation by affording facilities for transportation; as an agent of public convenience and public necessity,—such incidents as these compel a court which has arbitrarily deprived it of the right to manage its property to see to it that, while the corporation is thus powerless, its express or implied obligations towards the community are still recognised as binding, and its franchises are in no wise impaired by non-user. As Judge Brewer well says¹, this thought, that a railroad company owes a duty to the public, always underlies the rule by which receivers and courts are to be governed. And although this duty is not enforceable under all circumstances, yet it is one to be enforced by courts themselves whenever they take possession of railroads through their officers.

The acts necessarily implied in such conservation and management, and which are proper for the court to perform, are not unlimited. The observation made above, that powers may be exerted by the courts which are far greater than those possessed by the corporation, was not intended to refer to the policy that might be pursued in such management, nor to the details of its execution. Indeed, there are certain things which it would be perfectly lawful for the company to do, but which for a court would be quite out of place. These will be touched upon when the subject of augmentation of the property is considered. The larger powers assumed by the court concern what, to put the matter in its popular aspect, is said to be a substantial dishonour of the obligations of a contract existing between the company and other parties.

By taking charge of the property the receiver necessarily incurs debts. It matters not whether there is a mortgage lien upon the property, a certain class of those debts must be paid first. Much of the popular complaint which is so frequently heard, of the hardships sustained by bondholders in being compelled to share with others the security and lien which they supposed was theirs alone, is due

¹ *Central Trust Co. v. Wabash R. R. Co.*, 23 Federal Rep. 865.

to an entire misconception of the limitations of the mortgage grant, and of the conditions upon which it is invariably made.

There are more liabilities than one to which the property of a railroad corporation is exposed, and which cannot be avoided by any contract whatever with third parties. These liabilities are created by the municipal law, and everything done by the corporation is done subject to them. Of them may be mentioned the paramount lien of taxes, and also the liability of forfeiture to which a franchise is often subject, in case the conditions under which it is held by the company are not fulfilled. Such liabilities are always existent, and they are not greater in degree than has always been the liability of an estate in the hands of a court to pay for its own keeping. And it is certain that in a proper case such a liability as either of these would be duly enforced, were its enforcement demanded.

With regard to mortgagees, a portion of their security is their lien, and a portion is the right to enforce it. The one is of no less importance than the other. A mortgage lien without any remedy for a breach of covenant would be as valueless as a remedy without any cause of action to be enforced. The claim and remedy together constitute the security. As the lien can only exist subject to certain statutory liabilities of which our example is the liability for taxes, so in an equal degree the enforcement of the remedy must proceed according to fixed rules. A bondholder becomes such with a full understanding that, in case of a default, certain obstacles may appear to confront him, and that until these are overcome he must himself wait. Viewed in this light, the postponement of the claims of mortgagees to those of the holders of certificates, who, it must be remembered, are merely those persons whose financial aid the court has been compelled to seek, is but incidental to the court's exercise of its functions. The existence of such a debt is a hardship which is inseparable from this exercise, and the right of a court to act in such manner that debts may be incurred, is measured solely by the extent of its chancery powers to seize and to manage the property of litigants. Instead of there resulting an impairment of the obligation of a contract, which, as some of the State Courts declare, always follows when receiver's debts are given a preference, a court does no more than to put in motion its own machinery as prayed for by the creditor, and the rest follows as a necessary consequence.

It is not to be said that a court is never wrong in ordering the issue of certificates. But the wrongful manner in which its power may be exercised is no indication that power itself is always lacking, and the error will be found to consist either in an improper use of the funds derived or to be derived from their sale, or in the

fact that the particular circumstances presented did not warrant their issue at all.

What would amount to a wholly unwarrantable assumption of power are such acts as are not necessary for the preservation of the estate, and which, being performed, may involve it in expense, and incidentally may render necessary the issue of certificates. The distinction between those acts which are *ultra vires* and those which are not, may be imperfectly expressed by the terms that indicate the results which flow from them. The purpose of the latter has been shown to be conservation; the result of the former is augmentation; and if it shall appear that augmentation is the only thing accomplished, and that conservation has been wholly secondary to it, the error is at once apparent.

By 'augmentation' are meant additions to the estate which are not essential to its safe custody, nor required for its preservation in the strict sense of the phrase. The dividing line between the two is not very distinct, but the term may be said to include any acts by the performance of which the court engages in carrying forward either plans originally contemplated by the corporation, or other schemes or projects of public or private utility however attractive they may be, as a necessary result of which the property is charged with the payment of money. The validity of such acts is not sustained by any of the reasons which we have discussed, for the court cannot assume a power which the corporation lacked, and which must itself be founded only upon, and the exercise of which must be permitted only by, the peculiar relations that spring up when a receivership is initiated.

'The objections to such transactions are that they are necessarily, to some extent, speculative; that they arbitrarily unsettle interests founded upon the most solemn contracts; and that the court in conducting them abdicates its judicial function and exercises another more akin to that of an executive bureau. If therefore the action of a Chancellor goes to the extent of taking the property of the corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end of raising money by charging the railroad and its appurtenances with liens which are to supersede older ones, without the consent of the holders of these, he has passed beyond the boundaries of a Chancellor's jurisdiction¹.'

There are, however, two exceptions to this principle: one, where the parties in interest expressly consent that the court shall go beyond this usual and stricter rule of practice, and the other, where

¹ *Myers v. Johnson*, 53 Ala. 237.

some of the property is in such imminent danger of loss, or where the consequences of making permanent additions will certainly prove so beneficial to the estate, that the court is justified in such a departure.

The first exception is illustrated by many cases, where all parties have concurred in the view that the new work was necessary, and have stipulated upon the record that the disbursements should have priority. It is also illustrated in a measure by those cases where such assent is given by the mortgagees only, and the exercise of the power then invoked seems to imply that the owner of the property had no voice in the matter whatever. But the reasons why bondholders should be consulted appear to apply equally well to the corporation, for as the mortgagor, its interest is presumably as great as that of the mortgagee, and as owner of the fee, it is certainly entitled to say what shall be done with its property, and whether it desires to embark in or to continue to carry on a possibly hazardous enterprise at its own cost. But whatever rights it may have to enter such a protest, the fact of its insolvency seems to invite a total disregard of them. There, however, may be a theory upon which such action might be sustained, though, as it must be confessed, it is not supported by any precedent (nor indeed is it opposed by any).

Whenever a party in interest whose lien is superior to that of all others, agrees that the liens of certificates shall be paramount to his own, and that the proceeds shall be used for extraordinary purposes, for which, failing such consent, they could not be used, that party should be held to have agreed to share the security of his own lien with the certificate holders. Doubtless a case seldom or never has arisen where there has been a surplus at a foreclosure sale of a railroad. The practice is general of permitting the payment of the amount bid to be made in the defaulted bonds, the whole amount issued thus becoming, in the hands of a Purchasing Committee, a single fund, and making competition impossible; and the outcome is that the property is sold at a minimum price.

Were it otherwise, however, a serious question might arise between the bondholders and other (junior) claimants to the fund (or if there were no other claimants, then the corporation), concerning the bondholders' right to receive payment in full, without deducting from their own claims the amount of the certificates, of which the issue was authorised by them, and by them only, and the proceeds of which were used for other purposes than to preserve the property.

Should such a liability be established (and it does not seem unreasonable that those persons who have most assuredly profited by

the increased value, should in proportion to the benefits to be obtained share in the expense which they have caused to be incurred), then the limit of judicial power will clearly appear, and the result will follow that the corporation and its stockholders will be freed from responsibility for railroad financiering from the bench, and only those parties in interest will be liable, who may desire to take that risk in order to enhance their own security, and from whose consent the court has alone derived its powers. And for the same reason the company would be acting quite within its strict rights should it insist that, in case a judgment over for deficiency were applied for, or an action for a personal judgment on the bonds commenced, relief should be granted to it from any increased liability for such exceptional expenditure.

The second exception finds a noteworthy illustration in the case of *Kennedy v. The St. Paul & Pacific R. R. Co.*¹

In this case the court (Dillon J.) authorised the issue of certificates to raise funds for the construction of an unfinished portion of the road, making them a prior lien upon the property. Its most noticeable feature is, that it was not only a case of augmentation, but augmentation in spite of the opposition of the trustees acting for the bondholders, whose wishes were disregarded at the suggestion of a minority. The circumstances seemed to justify the court in taking such a departure, for upon the construction of the road depended a valuable land grant, which was the principal security conveyed by the mortgage, and which without such construction would have presently lapsed. There are so few precedents of this kind that it is only possible to point out that the exception exists without attempting to show its extent.

The foregoing observations may be summarised as follows:—

First. It is the duty of a court in a proper case to take possession of property in litigation for the benefit of all parties interested.

Second. While in its possession the court must preserve it from deterioration.

Third. The expenses incurred in doing this must fall upon the fund, and consequently should be borne by the claimants to it.

Fourth. It is not within the power of the court to incur expenses, chargeable upon the estate, for any acts of management which are not strictly acts of conservation; but

Fifth. Assent by parties in interest may confer such power.

Sixth. It is reasonable that the share of the estate coming to the parties giving such assent should bear the expense.

Seventh. Such extraordinary power may sometimes be assumed without such assent, when great danger to the fund is to be avoided,

¹ 2 Dillon, 448.

and when conservation, though not the direct result, may thus indirectly be accomplished.

In conclusion, reference may be made to still another instance of the exercise of the power to create preferences among creditors, which is not founded upon the idea of conservation. Not unfrequently an order is made permitting the receiver to pay debts incurred by the corporation for work done or supplies furnished within a short time prior to the commencement of the suit, usually ninety days, but often longer. The reason for this may sometimes be that it is necessary to satisfy the claims of labourers and employees in order to retain their services, but when the payment is for supplies furnished or labour already fully performed, the liability for which is included in the unsecured floating debt of the corporation, it cannot be regarded as promoting the interests of any one, save particular creditors, and then only at the expense of others. These payments, when made, always come out of the earnings, and the creditors whose superior claims are postponed are, in cases of mortgage foreclosure, the holders of the bonds, when these are secured by a pledge of the earnings. Though such a measure is novel in the history of equity jurisprudence and is coercive in its nature, it may be justified upon the ground that until bondholders proceed to enforce their remedy against the debtor's property, and during the time that it remains in possession, the corporation should pay such debts out of the earnings¹. Upon this principle the reasoning of Mr. Chief Justice Waite in *Fosdick v. Schall*² was founded. He says:—

‘ We have no doubt that when a Court of Chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labour, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested.

¹ *Bridge Co. v. Heidelberg*, 94 U. S. 798.

² 99 U. S. 255.

This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

'The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labour, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do.'

The propriety of exercising this power thus appears to depend upon the evidence showing that the earnings have been improperly applied, and doubtless where the default had been of so long continuance as to preclude the idea of a diversion of earnings for the bondholders' benefit, such a preference would not be declared without the express consent of all parties in interest.

ALBERT GALLUP.

ON LICENSING OF NUISANCES.

THE considerations set forth in the following paper have been in great part suggested by observation of the tram system tolerated in the city of Sydney. The so-called tramways of this city are nothing more nor less than street-railways. The cars are drawn by locomotive engines, which make as much noise (by whistling and otherwise) and travel as fast as those upon enclosed tracks. In addition to this there are usually more cars than one behind each engine (sometimes as many as four), and before the first point of divergence one set of cars follows another with greater rapidity than do the trains of the Metropolitan Railway. There are special stopping places for taking up and setting down passengers, and, as in London, other traffic moves freely upon the rails except when cars are actually passing. It may therefore fairly be said that London, New York, and Sydney have respectively solved the question of providing railway communication between the city and suburbs, by running their trains underground, overhead, and on the street level. The trams of Sydney are government property.

Without committing one's self to the assertion that Sydney trams are dangerous nuisances which should not be tolerated, they are nevertheless suggestive of thoughts on the subject of nuisance generally. And it may be remarked in the first place that public utility will sometimes permit a state of things which will not merely deteriorate the property, but endanger the very lives of members of the public. Such an accident as that which produced the case of *Rex v. Pease* (4 B. & Ad. 30) might very possibly have been followed by loss of life. Yet the principle held, that injury in one respect was compensated by benefit in another; and it was maintained by most of the judges in *Rex v. Russell* (6 B. & C. 566), that even at common law a nuisance was thus justified. Much more then when the annoyance has been expressly sanctioned by the legislature.

Another consideration is suggested by observing the date of the case of *Rex v. Pease*, which was 1832. Steam railways were then in their infancy, and horses were unaccustomed to the new phenomenon. We have now many railways running across and parallel to various thoroughfares, and the noise and appearance of the locomotive engine has become familiar. The probability, therefore, of a repetition of similar circumstances is greatly diminished, and the balance augmented on the side of public advantage. So in the case

of the Sydney trams, we observe horses moving quietly in the presence of an apparition which, did it appear in London, would produce a panic the consequences of which it would be hard to estimate. Thus the legislature may be justified, in considering whether a particular state of things shall be permitted, in considering ultimate results, after the novelty has worn off, as well as the immediate effect.

But in the absence of such special permission, the protection afforded to individuals engaged in dangerous or offensive works is, according to several modern decisions, exceedingly insecure, however important those works may be. And the tendency is decidedly in the direction of increasing the restrictions laid upon them. In the case of *Rex v. Russell* (6 B. & C. 566) an indictment was preferred against a wharf owner for erecting staiths in a navigable river, he not having had special authority for the act. The judges, who were not all agreed, held this much in common; that the mere want of a previous writ of *ad quod damnum* was not in itself conclusive against the defendants. Yet the Chief Justice (Lord Tenterden) remarked upon the desirability of a man's procuring this sanction before taking upon himself to act in a possibly offensive manner. Without such a protection, all such works are carried on at the operator's peril, and whether public advantage should be allowed to outweigh public inconvenience constituted the point of difference in the above case.

Rex v. Russell is a much older case than that of the *Attorney General v. the Mayor of Leeds* (39 L. J. Ch. 254). In this case it was held that public nuisances cannot be tolerated merely upon the ground that a balance of convenience is on the side of permitting their existence. Nor was the argument admitted that the case of a dispute between two portions of the community differed from that of a private individual. Infringement of rights is a breach of the law whether committed by individuals or by aggregates.

But not even length of time will always secure the individual from interruption. The well-known case of *Sturges v. Bridgman* (11 Ch. D. 852) very decidedly lays down that there can be no prescription acquired to make noise in a place where, though never so long continued, no person had previously been able to complain of it, owing to no annoyance having been caused. And in the argument and judgment in that case it was pointed out that a person wishing to preserve his rights inviolable, could do so by securing so much ground as would for ever prevent his occupation from becoming a nuisance. The only other way is by special permission from lawful authority; not necessarily from Parliament, but perhaps from some local board having powers to grant the same.

And with respect to the principles upon which such authority should be granted, it would seem evident that the question must turn upon one of paramount public good. Two of the judges in *Rez v. Russell* held that, though an enterprise be started with the sole idea of profiting the proprietors, yet the public benefit which would ensue must be taken into consideration in deciding upon its lawfulness. More recent cases negative this proposition, but at all events public benefit is considered when special authority is applied for. It is on this principle that railways are tolerated, which are, at least when owned by private corporations, primarily made with a view to personal advantage. And it was justly pointed out in *Sturges v. Bridgman* that a considerable disturbance of national trade would ensue, were it possible for one individual to stop all the manufactures of a particular district by going to live there. Does then the over-ruling of *Hole v. Barlow* (4 C. B. N. S. 334: 27 L. J. C. P. 207) so completely put aside the question of a 'convenient' locality, that this consideration can never again arise in deciding a case?

Three courses are at present open to those who wish to pursue lawful occupations, which are nevertheless attended with unpleasant accompaniments.

(1) To choose a spot remote from human habitation, and to trust to probabilities to be left undisturbed till a prescriptive right may be acquired.

(2) To secure so much land to one's self as to reduce to a minimum the possibility of the occupation becoming an annoyance.

(3) Where possible, to obtain special permission from Parliament, or some minor constituted authority, to perform the act desired.

The first of these precautions is adopted by cemetery companies, and indeed, the law compels them to permit no interment within 100 yards of a dwelling (see 18 & 19 Vict. c. 128). But as there is nothing to prevent human habitations from approaching the ground which was originally sufficiently remote for the purpose, the security thus provided is very imperfect. And the opinion has long ago been abandoned that a nuisance is unassailable if only it were established before the approach of the parties annoyed thereby.

The second precaution might be attended with much inconvenience. To consider again the case of a cemetery company. Could such a corporation secure to itself so much land that it could always have a clear margin of 100 yards between its burial sites and the nearest inhabited house? Were it possible for the company to do this, so far as commercial success were concerned, how far would the statutes of Mortmain permit such a proceeding? And private individuals would in many cases find the expense of procuring so wide a reach of ground such as to render nugatory all their operations.

The third measure is that which is taken by railway companies, and in their case compulsorily. And this seems at once to be the safest and justest, and, were we more familiar with it, it would be the most obvious. Lord Tenterden pointed out in *Rex v. Russell* (6 B. & C. 600), that neglect to apply for such special permission furnishes an argument against the propriety of one's act, and intimates the party's apprehension that an enquiry may be unfavourable to his views. The course would ensure safety, because 'actus legis nemini facit injuriam,' and there are cases enough besides that of *Rex v. Pease*, to show that whatever be properly done and with permission from authority may be done without fear of legal consequences. And it would be just, because, before permission be granted, due consideration would be taken of the interests of all parties affected, and compensation where possible decreed for loss occasioned. The balance would be adjusted so far as possible between public advantage and the regrettable but inevitable disturbance of individual benefit which a new order of things cannot fail to produce.

It is moreover an obvious proposition, that the older and more thickly peopled a country, the greater will be the danger of a particular occupation becoming a nuisance. In such new and little-populated countries as the colonies of Australia, probably no difficulty would be experienced in finding a suitable spot for any desirable occupation, however noisy or otherwise offensive. But the case is vastly different in England. The rapidly-increasing population of an already over-inhabited country is daily becoming a more perplexing question to political economists. And side by side with this population we have our great collieries and factories which occupy space, render air and water impure, and emit discordant noises night and day. To stop the works in question would ruin the trade of the country. Their continuance must in some way be reconciled with the rights of the surrounding inhabitants. Notwithstanding the decision of *Bamford v. Turnley* (31 L. J. Q. B. 286) the question of a suitable spot for important but unsavoury operations would seem to be one necessary to consider. It is indeed recognised in the dictum (propounded in *Sturges v. Bridgman* and elsewhere) that what would be a nuisance in one place is not necessarily so in another. But does this sufficiently protect the manufacturer? It is at all events held that a new operator may be restrained from emptying his refuse into a stream which older ones had acquired a prescriptive right of polluting (see *Wood v. Waud*, 3 Exch. 772). Could a manufacturer be equally restrained from adding to noise or smoke who chooses a site for his works in a locality already devoted to similar purposes? According to present

THE LAW OF ESCHEAT.

LATE in the Session of last year the Lord Chancellor introduced into the House of Lords a Bill 'for repealing certain enactments relating to Escheators and the procedure in cases of Escheat; and for regulating the procedure in such cases.' The Bill appears to have passed through both Houses almost without debate, though it did not escape the nearly inevitable 'block' in the Lower House. At the instance of the Attorney-General, considerable additions were made in Committee of the House of Commons, and the Bill eventually passed into law as the Escheat (Procedure) Act, 1887 (50 & 51 Vict. c. 53).

A Memorandum, which was issued with the Bill, gives the key to its real object, and, at the same time, to some of its main defects. 'Since the abolition of feudal tenures,' says the Memorandum, 'the enactments relating to escheat and escheators have lost their general importance. With a view to the preparation of a new edition of the Revised Statutes, it is proposed to repeal these enactments.' Similar Acts dealing with the law relating to the office of sheriff and of coroner have been passed for the same object at the instance of the Statute Law Revision Committee. It was hardly to be expected that much improvement should be effected in the law of escheat by a Bill promoted by persons not interested in that branch of the law and for purposes entirely foreign to it. It is, therefore, scarcely a matter for surprise that, in the attempt to reduce the bulk of the Statute Book, the law of escheat shall not have been greatly the gainer. The Act under consideration repeals eleven statutes enacted between the years 1300 and 1548, and has thereby effected a saving of about sixteen pages for the new edition of the Revised Statutes. A few old statutes relating to escheats have been left untouched, and on what principle the eleven repealed have been selected from among the others it would be difficult to say. It can hardly be that the former statutes do not fall within the scope of the Act. Though it is evident from the title and from the recital in the preamble that the Act was intended to deal only with the practice in cases of escheat, some of the statutes repealed are concerned with questions of law, and define carefully the rights of the subject against the Crown. It would be a mistake, too, to suppose that the Acts repealed are those, and those only, that in the changed circumstances of our time have become obsolete.

Perhaps no enactment of the Session of 1887 could furnish a better illustration of the unfortunate manner in which our laws are passed. The subject of escheat is a small one, and with some care all necessary provisions relating to it might have been included in a Consolidation Act of very moderate size. All the old statutes might then have been repealed, and, for ordinary purposes, it would have become unnecessary to turn to the legislation of 500 years ago. No one can doubt that infinitely greater service would have been rendered by such a re-casting of the form of the law as to make it intelligible and accessible to every inquirer, than by merely sweeping away 'certain' enactments, and leaving others to stand, to the confusion of the student of this portion of the law. But a consolidation or codifying Act would have required much thought and pains in the preparation, and, no doubt, was not the work for which the Statute Law Committee was appointed. The interest of that body in the law of escheat extended to this (and no further), that a saving of sixteen pages in the Statute Book could be effected by a repealing Act, and a repealing Act was consequently put forward. It was not, apparently, until some weeks after the Bill had been introduced into Parliament that it occurred to somebody that the Acts proposed to be repealed laid down some principles of law that were by no means obsolete, and that certain of these would require re-enacting. Important additions were therefore made to the Bill, and one of the statutes was omitted from the Schedule of repeals in Committee of the Lower House. By this means the Bill attained the heterogeneous character which it has retained as an Act. Its faults are to be attributed, not to the defective machinery for passing Bills through Parliament, but to haste in the conception and drafting of the Bill. There is no good reason why a Bill, dealing with a non-controversial subject, should not be presented to Parliament in a complete condition. The effect of every clause ought to have been carefully weighed beforehand, and every case within the scope of the Bill provided for, as far as practicable. Work of this kind, it must be repeated, cannot be expected from a body appointed for other purposes, like the Statute Law Committee, or from any lawyer or parliamentary draughtsman who is not an expert in the particular branch of law dealt with; but it may not be out of place to say here that such specimens of legislation as the Escheat (Procedure) Act, 1887, show the pressing necessity for the appointment of some commission or other permanent body authorised to deal with the form and expression as well as with the mere bulk of our statute law.

The Act consists of three sections in all, the first giving the short title. Section 2 gives (sub-section 1) power to the Lord Chancellor,

with the assent of the Treasury, to make rules for the *procedure* on and incidental to and consequential on the holding of inquiries into the title of Her Majesty in right of the Crown, or the title of the Duke of Cornwall, to any real estate or any interest therein, in cases of escheat or alleged escheat, whether in relation to the Crown or otherwise, or the holding of any inquest of office, not otherwise regulated by law. (2) Such rules are to provide that an inquisition touching real estate *shall find of whom the real estate was held*, and that every inquisition shall be forthwith returned into the Central Office of the Supreme Court of Judicature, and that every person aggrieved by any such inquisition *shall be entitled to traverse* the same, or to object thereto in such manner as may be from time to time directed by rules of Court. (3) Subject to the provisions of Section 6 of 'The Intestates Estates Act, 1884,' no grant shall be made of any real estate alleged to be escheated, until after the inquisition finding the title thereto has been returned to the Central Office. (4) An inquisition shall not prejudice any rights which, at the time of the death of the person that led to the inquisition, were vested in some other person. (5) If the inquisition does not find of whom the real estate was held, any person aggrieved shall be entitled to obtain from the High Court an order for the taking of another inquisition. (6) The Act is to apply with certain modifications to inquiries into the title of Her Majesty in right of her Duchy of Lancaster. (7) All rules are to be laid before Parliament within a certain time after they are made, and are to be judicially noticed and have effect as if enacted by the Act.

The provision in sub-section 2 that the inquisition shall find of whom the real estate was held is perhaps in form a matter of procedure, but in substance it involves an important question of law. Instances still occur from time to time in which escheats are claimed by the lord of a manor or other private person entitled to the immediate seignory, and the finding by the jury at the inquest determines, subject to the right of traverse or to the issue of a *melius inquirendum*, the question whether the Crown or a mesne lord is entitled. Again, it is provided that every person aggrieved by an inquisition shall be entitled to traverse the same. The substantial effect of this part of the clause is to confer on persons having any claim a right to institute proceedings against the person in whose favour the office has been found, and it can hardly be contended that the words extend only to a regulation of the form of the proceedings to be taken. It is not clear whether this sub-section has the effect of entitling the Crown to traverse an inquisition when the finding is against the Crown. The words are probably sufficient to extend to the Crown if taken in their ordinary signifi-

cation and by themselves; and no doubt the Queen is a 'person' in one sense (Jessel, M.R., *In re Mercer and Moore*, 14 Ch. D. 295). But the difficulty is that this clause was probably intended to take the place of some of the repealed enactments giving a right of traverse, and under the old law it is clear that the Crown cannot traverse as the subject can, but, if dissatisfied with the result of an inquest of office, must direct the taking of a further inquisition. It is to be regretted that the intention of the framers of the Act has not been more clearly expressed.

Sub-section 3 re-enacts a principle of law that was formerly considered to be of great constitutional importance. Grievous complaints were from time to time made of the conduct of the king's escheators in seizing lands without the authority of an office found for the king, and of the king's ministers in causing grants of such lands to be made without office found and so depriving the person lawfully entitled thereto of an opportunity of tendering a traverse, and four of the statutes now repealed (8 Hen. VI. c. 16; 18 Hen. VI. c. 6; 1 Hen. VIII. c. 8; and 1 Hen. VIII. c. 10) were particularly directed against this evil. More will be said on this subject in a subsequent part of the paper.

Sub-section 5 appears to have been enacted in substitution for a section (numbered 5 in the Rev. Stat.) of one of the repealed Acts, 2 & 3 Edw. VI. c. 8, which provided that where any inquisition or office should be founden by these words or like *Quod de quo vel de quibus tenementa prae dicta tenentur Juratores prae dicti ignorant*, or else founden holden of the king *per quae servitia ignorant* or such like, it should not be taken for any immediate tenure of the king *in capite*, but in such cases a *melius inquirendum* was to be awarded. An inquisition not finding of whom the lands are holden is in substance the same as one finding the ignorance expressly (*Doe v. Redfern*, 12 East, 115). It is, however, laid down that the *melius inquirendum* is grantable only on the part of the Crown, and that the proper remedy of the subject is by way of traverse (*Exp. Roberts*, 3 Atk. 6). 'If the office be found against the king, a *melius inquirendum*, or further inquiry under the former commission, may be awarded for the king' (Chitty's Prerogatives, 258). The language of this sub-section may possibly be taken as extending the remedy by *melius inquirendum* or by procedure analogous thereto, to a lord of the manor or other private person entitled to the immediate seignory. But it is doubtful whether this procedure can be applied as against the Crown, and whatever be the proper construction of this sub-section, it will probably not work any considerable change in practice.

The third and last section of the Act repeals the Acts mentioned

in the Schedule to the extent therein mentioned, and after providing that this repeal shall not affect anything done before the commencement of the Act, or then pending, goes on as follows:—‘Except so far as may be otherwise directed by rules under this Act, any procedure or practice heretofore in use under the provisions of any Act hereby repealed or otherwise may be used as if this Act had not been passed.’ A more unfortunate course could hardly have been adopted, though this clause throws great light on the methods of legislation in England. A practice in use under the provisions of an Act of Parliament must, it is submitted, be interpreted and controlled by reference to that Act, and if, therefore, a question arises as to the validity or extent of the practice, it will be necessary to turn to the Act. The result in the present case is that while, in so many words, the Acts are declared to be repealed, the practical effect of the clause quoted above may be to keep them in force, and the student may still be put to the inconvenience of having to refer to Acts of Parliament that, on account of their so-called repeal, are altogether omitted from collections of the statutes, or are not set out at length.

The power given by the Act to make rules for regulating the procedure in cases of escheat may be of considerable service. It is the belief of the writer that considerable changes in the mode of finding the title of the Crown to escheated lands might be made with advantage, and some of these will be mentioned at the conclusion of this paper.

The conception of escheat is inseparably connected with the idea of tenure. It proceeds upon the assumption that all lands in the occupation of a tenant are held of some superior under certain conditions, by virtue of an original grant. The tenant is not the owner of the land, but only of an *estate* in the land, and upon the determination of this estate, the feud falls back into the lord's hands by a termination of the tenure. ‘When there is no longer any tenant, the land returns, by reason of tenure, to the lord by whom, or by whose predecessors in title, the tenure was created’ (*A. G. of Ontario v. Mercer*, 8 App. Cas. 772). The nature of title by escheat has been much disputed. According to the point of view from which it has been regarded, writers have called it a species of reversion, a purchase and a descent. Strictly speaking, it comes under none of these denominations. There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple. It is said to partake of the nature of a purchase because some act of the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters, or (before 3 & 4 Will. IV. c. 27. s. 36) till he brought his writ

of escheat. But Mr. Hargrave points out (Co. Litt. 18 b. n.) that the lord's title to take possession commences immediately on the want of a tenant and is vested in him by mere act of law, though he must do some act to put himself into the *actual possession*. To consider escheat, again, as a title by descent, implies an entire misconception of its nature. The lord does not take (as has been often inaccurately said from Glanvill downwards) as *ultimus haeres*, by way of succession or inheritance from the last tenant. The lord does not take as heir, but because there are no heirs. The tenant's estate (subject to any charges upon it which he may have created) has come to an end, and the lord is in by his own right.

In *Burgess v. Wheate*, 1 Eden, 191, Sir Thomas Clarke, M.R., drew a distinction between a reversion in default of heirs, and an escheat, where there was an heir and by civil law impediment he could not take. 'The *reverter* took place when the grant expired naturally, and the heirs failed in length of time. In case of *escheat*, it was cut off by civil law impediment, and was an accidental determination of it.' This seems to agree with Lord Coke's statement that an escheat is a casual profit, *quod accidit domino ex eventu et ex insperato* (Co. Litt. 92 b). The term was also once applied to other property which fell to the lord, 'by chance and unlooked for,' as trees blown down, &c. In course of time, however, the lord's right to have the land returned on the expiration of the grant as a so-called reversion was confounded with his right on the determination of the tenure upon some unforeseen contingency, and in both cases alike the right was called an escheat.

In order to convey a correct idea of this branch of law, it cannot be too often insisted that an escheat is in its nature an incident of tenure. It is the more necessary to keep this origin of the conception in view from the fact that it has been ignored or misunderstood in many of the authorities, and things having no connection with the relations of lord and tenant have been classed among escheats. An escheat, it must be remembered, never falls to the king, as such, but goes always to the lord of the fee. Great confusion still exists on this point, arising from the fact that mesne lords are now seldom found, and that the Crown is commonly entitled as the immediate lord. The title of the Crown to escheats is entirely based upon the feudal idea that all land is held of some superior, and that, where no badge of tenure can be traced, the land is to be considered as held immediately, as well as ultimately, of the Crown. The king is lord paramount, and where no intermediate lord appears to claim, all tenants are assumed to hold of him directly by service of mere fealty. The distinction which exists between the cases in which the lord takes lands as lord paramount, and those in

which he takes by virtue of his royal prerogative, has not always been kept in view. A reference to the old law of forfeiture for crime may make the matter clearer. A person attainted for felony or petit treason was deprived of all his lands, and these went to the lord of the fee as an escheat, subject to the king's day, year and waste. But if the crime were high treason, the king, as representing the injured state, had the land by forfeiture, of whomsoever it was held, and not in respect of any escheat by reason of any seignory (2 Inst. 64). These forfeitures of traitors were given to the king by the common law, and did not depend upon the law of feuds or tenures, and the distinction was recognised and continued in the Statute of Treasons, 25 Edw. III. st. 5, c. 2. It has been asserted by some writers that lands coming to the lord's hands on the tenant's attainder for felony cannot properly be called escheats, and they are said to be more correctly called forfeitures (see Scriven on Copyholds, 4th ed. 631). It is, however, submitted that since the lord in this case takes by reason of tenure, or rather of the extinction of tenure, the term escheat is properly employed, and that the term forfeiture should be restricted to those cases in which the lands of the offender passed to the king in his sovereign capacity. The operation of attainder for felony was greatly narrowed by 54 Geo. III. c. 145, and was entirely abolished by the Felony Act, 1870, 33 & 34 Vict. c. 23. The matter is therefore now of little importance, though the Act of 1870 does not operate retrospectively.

There were other cases where lands became vested in the Crown by prerogative right in which the same confusion with rights depending upon tenure may be noticed. Thus an alien might purchase, but was by law incapable of holding lands by purchase. On such a purchase being made, the king by his prerogative became entitled to the lands, and this right has often been called an escheat. But upon examination it will be found to differ from an escheat much in the same way as a forfeiture, in the strict sense, differs. The king, and not the mesne lord, was entitled to the alien's lands of whomsoever they were held. And yet this right was not to be considered as accruing in consequence of a penalty or forfeiture, but as arising merely from the policy of the law (*A. G. v. Duplessis*, 2 Ves. 287). Another case mentioned in some of the older statutes and books is that of the *Terrae Normannorum*. After the separation of Normandy from England, the King of France seized the lands which the English held in Normandy, and the King of England in like manner seized the lands which the Normans held in England. Land so seized was said to be the king's escheat of Normandy, and was not regarded as a common escheat, 'for it cometh to the king by reason of his person and crowne' (*Riparave's case*, 2 Inst. 64).

The Normans were considered to be public enemies, and the king, as the representative of the State, became entitled to their lands as forfeitures. The terminology employed by Spelman is not free from ambiguity. Escheats are by him divided into Regal and Feudal. 'Regal,' says he, 'are those obventions and forfeitures which belong generally to kings, by the ancient right of their crowns and supreme dignity. Feodal are those which accrue to every feodal lord, as well as to the king, by reason of his seignory' (Feuds and Tenures, ch. 23). The error in speaking of royal escheats is noted by Sir Martin Wright, who points out (Tenures, p. 117) that such lands or tenements as are not held immediately of the king and yet happen to him upon the commission of any treason, are not escheats but forfeitures.

When the feudal system flourished in full vigour in this country, the causes of escheat were numerous, and this incident of tenure was a source of considerable profit to the lord. Besides the failure of an heir who could inherit and the commission of felony, the tenant might do many acts which let in the lord to claim the land as an escheat. Thus the heir originally took by purchase and independently of the ancestor to whom the grant was made, and any attempt to alien the land made by either the grantee or the heir operated as a cause of seisure by the lord. By the time of Bracton the heir was held to take by descent, and a power of alienation, with the leave of the lord, was introduced. Cases of escheat still arose through the efforts of the tenants to alien without obtaining the lord's licence, but, as to tenants *in capite*, it was provided by 1 Edw. III. c. 12, that in such cases the king should not hold the lands as forfeit, but that a reasonable fine should be taken. The next step in favour of the tenant was a practice which arose of making a larger grant, i.e. to him, his heirs, and assigns. This enabled the tenant to alien without licence, but so only that the lord was not prejudiced by a lessening of the service rendered. In course of time the mention of assigns became unnecessary, and liberty of alienation was allowed where the grant was only to the tenant and his heirs. Logic demanded that one further step should be taken. As the tenant had the power to defeat the lord's right to an escheat by any mode of alienation, he ought consequently to have every inferior power. The lord accordingly was held, on taking by escheat, to be liable to the incumbrances created by the last tenant. Alienation in mortmain to religious houses was more stringently forbidden, since lands so given continued in unchangeable perpetuity without descending to an heir, and therefore never produced the casualties of escheat and other feudal incidents. This form of alienation was forbidden by *Magna Carta* (c. 36), and lands so given

were to accrue to the lord of the fee. It became the practice for a person wishing to make a grant in mortmain to apply for the king's licence to do so, and thereupon an inquisition *ad quod damnum* was taken in pursuance of a writ directed to the escheator, in order to ascertain what loss of feudal profits would be sustained by the Crown or other lord of the fee, if the grant should be sanctioned. If the tenant erected crosses upon his houses or tenements in prejudice of his lord that he might claim the privilege of the *Hospitalers*, to defend himself against his lord, he forfeited his tenancy (Co. Litt. 92 b). Outlawry had the same effect in entitling the lord by escheat, as an attainder for felony, and escheat or forfeiture consequent upon outlawry is not affected by 33 & 34 Vict. c. 23. Glanvill gives another case:—*Si quas mulier, ut haeres alicujus in custodiam domini sui devenerit, si de corpore suo forisfecerit, haereditas sua domino suo pro delicto ipsius remanet escaeta* (Lib. VII. c. 17).

Changes in the law of inheritance and descent have also greatly decreased the occasions of escheat. Thus the doctrine of corruption of blood in consequence of attainder for treason or felony not only made the person attainted incapable himself of inheriting, or transmitting his own property by heirship, but also obstructed the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. Lands, again, would before 3 & 4 Will. IV. c. 106 (which also abolished the above-mentioned effect of attainder) have escheated rather than have ascended from son to father (*haereditas quidem nunquam naturaliter ascendit*), or rather than have devolved on any kinsman, however near, related only by the half blood. Further, the estate was never allowed to go to the maternal line after having once gone to collaterals *ex parte paterna*. And, lastly, down to the year 1859 (22 & 23 Vict. c. 35, s. 19) an escheat would have taken place on the death of the person last entitled to land, if no heir of the blood of the purchaser were in existence, although the last owner might have left a person related to him by consanguinity and able to take as heir. Under the feudal system, again, the tenant had no power to defeat the lord's rights by a devise of his lands by will. But liberty of testamentary alienation gradually arose, and the occasions of escheat became much fewer on this account.

On the other hand, under the provisions of some modern statutes property will now escheat in cases where formerly no escheat would have occurred. The Bankruptcy Act, 1869, for instance, enacted (sec. 23) that certain property disclaimed by the trustee in bankruptcy should revert to the person entitled on the determination of the estate or interest of the bankrupt. In *re Mercer and*

Moore, 14 Ch. D. 287, where freehold property, subject to an equitable charge, had been disclaimed by the trustee of the mortgagor, Jessel, M.R., was of opinion that the Crown was entitled. 'There is no person literally entitled upon the determination of the freehold to take except the Crown. If a freehold estate comes to an end by death without an heir, or by attainder, it goes back to the Crown on the principle that all freehold estate originally came from the Crown, and that where there is no one entitled to the freehold estate by law, it reverts to the Crown. If this [section] means literally the determination of the estate anyhow, it may determine by bankruptcy as well as by attainder, and then literally this section would seem to give it to the Crown.' The Master of the Rolls probably meant that the lord of the fee was entitled, but considered the probability of a mesne lord coming between the tenant and the Crown so remote as to be capable of being disregarded until some such claim were put forward. The wording of sec. 55 (2) of the Bankruptcy Act, 1883, is different, and it remains to be seen whether the Court will put a like construction upon it. But in any case property disclaimed is not likely to prove a very valuable acquisition. A more important occasion of escheat is to be found in sec. 4 of the Intestates Estates Act, 1884, which will be presently referred to.

All lands and tenements held in socage (and formerly lands held by knight service), whether of the king or of a subject, are liable to escheat. So also are shares in the New River Company (*Davall v. New River Co.*, 3 De G. & S. 394). The feudal fiction of an original grant was, however, kept up by the condition that the estate or benefit escheating must have been capable of being granted, and therefore there was no escheat at common law of possibilities, or conditions strictly so called, or rights of action, which could not be granted. From the nature of an escheat, too, it follows that it must be of the entire fee; therefore an estate tail does not escheat, but the land goes to the person in reversion, unless the tenant in tail has also the reversion in fee in him, for, in that case, the whole estate will escheat. An estate in reversion or remainder is subject to the ordinary law of escheat, and it is submitted that the lord may at once establish his title thereto without waiting until it becomes an estate in possession. The old Saxon tenure of gavelkind retained many of the characteristics of Anglo-Saxon law, and among others an immunity from escheat on the attainder of the tenant for felony, though both before and after the Conquest gavelkind lands were liable to forfeiture for treason. It is often said that copyholds do not escheat to the Crown, but to the lord of the manor. But the term escheat can only be applied in a loose and inaccurate manner

to copyholds which are held 'at the will of the lord according to the custom of the manor.' The freehold remains in the lord, and upon the death of the tenant intestate and without an heir, his interest falls into the fee and is extinguished, unless a regrant is made. The better opinion seems to be that customary freeholds, which are held not at the will of the lord, but according to the custom of the manor, stand on the same footing, though here the freehold is sometimes in the tenant. The principle that money directed to be laid out in the purchase of land is to be considered as real estate, will not be applied by a Court of equity for the benefit of the Crown or a mesne lord, claiming by escheat. It has been broadly asserted that the Crown comes under no head of equity (Lord Loughborough in *Walker v. Denne*, 2 Ves. jr. 184) and cannot, therefore, call for the conversion to be effected. A stronger objection to the claim of the lord is pointed out by Mr. Lewin (*Law of Trusts*, 8th ed. 940), who says that in such a case there can, as a general rule, be no claim for an escheat by any one, since, until the land is actually purchased, it is uncertain who will fill the character of lord. In *Walker v. Denne*, it seems to have been assumed that the Crown would be the lord. As escheat is said to be a consequence and fruit of tenure, the principle was only applied, under the old law, to whatever lay in tenure. Thus a rent-charge, rent-seck, right of common, fair, market, free warren, corody, or any kind of inheritance that is not holden, would not have escheated on the death without heir and intestate of the person last entitled, but would have become extinct. An alteration of the law has been made by section 4 of the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), which extends the law of escheat to any estate or interest, whether legal or equitable, in any incorporeal hereditament. It is believed that no case of a claim under the Act, by the Crown or a mesne lord, to an escheated incorporeal hereditament has yet come before the Courts, and it is apprehended that considerable difficulty may arise in the working of this attempt to impose an incident of feudal tenure upon property which is not held of any lord, mesne or paramount. In a case which will presently be referred to more at large, it was decided that a trust estate did not escheat on the death of the *cestui que trust* without heirs, but that the trustee, in such a case, might continue to hold the land in the absence of any person able to establish a claim. An use before the Statute 27 Hen. VIII. c. 10, was not liable to escheat because it did not lie in tenure, and trusts followed, for this purpose, the old law of uses. The same section, however, of the Intestates Estates Act enacts that any equitable estate or interest in any corporeal hereditament, whether devised to trustees or not, shall escheat as if it were a legal estate.

It has been said that there cannot properly be a reversion expectant upon the determination of an estate in fee simple. In the case, however, of a grant of lands to a corporation and its successors, it is laid down that upon the dissolution of the corporation, there shall be no escheat of the land, but that it shall revert to the donor, by virtue, says Lord Coke (Co. Litt. 13 b), of a condition annexed by law to every such grant. It may, however, be doubted whether this exception would now be upheld in a Court of law. Cases may arise, too, under settlements, in which, on the death of the person last entitled, intestate and without heirs, the lands will not escheat, although the whole estate of the settlor appears to have been divested by the deed. The provision that equitable estates shall be subject to escheat will not give the lord a claim, for it is held that in such case the settlor only intended to exclude himself in favour of certain specified persons, and when these no longer exist, a resulting trust is raised by construction of equity in favour of the settlor.

The position of the lord taking by escheat with regard to the escheated property is not in all respects the same as that of a person taking by grant, devise or descent. The lord comes in by title paramount: his estate is quite independent of the estate of the tenant which has expired. He comes to the estate in the *post*, according to the old technical phraseology; that is to say, by a title paramount that of the person on whose death without heir the right of escheat attaches. His independence of the estate of the last tenant is attended with peculiar consequences, which may work either in his favour or to his disadvantage. Thus it is laid down that the lord by escheat shall have the rent reserved on a lease by the tenant, but he cannot re-enter for condition broken, because he has no privity with the lessor. The right of distraining for the rent is in the lord, not as heir, but as incident to his reversion. Again, for the purpose of binding the lord in escheat, deeds have been held good against him that would have been void or voidable in other respects, as a feoffment of an infant with livery. The lord will also take subject to any incumbrances created by the last tenant, because the power of creating lesser estates is incident to a fee simple, and an exercise of that power is therefore binding on the lord. Thus if the last tenant had granted a rent or demised the land for a term of years, by way of mortgage or otherwise, these partial alienations will bind the lord. So the incidents of dower and curtesy may attach to the land in derogation of the lord's right. The lord is sometimes prejudicially affected, not only by the act of the last tenant or by rules of law annexing incidents to the tenant's estate, but by statutory enactment impressing certain qualities upon the

land itself. Thus in *Evans v. Brown*, 5 Beav. 114, it was held that under Romilly's Act, 3 & 4 Will. IV. c. 104, lands coming to the lord by escheat were assets in his hands for the payment of the debts of the last tenant. This Act, however, would probably be held not to apply where the escheat is to the Crown, as the Crown is not expressly named in it. The reason that the lord taking by escheat is subject to incumbrances in general is that they are annexed to the possession of the land without respect to any privity; but the lord is not subject to any incumbrances annexed to the privity of estate. A trust, for instance, is only a personal confidence between the trustee and the *cestui que trust*, and such confidence is a privity confined to them. On the death of the trustee, therefore, intestate and heirless, an escheat took place, and after considerable conflict of views, it was the better opinion that the lord took the land freed from the trust, and from any obligation to the *cestui que trust*. The same result took place where a mortgage in fee had been made, and the mortgagee died intestate and without heirs. But it was naturally thought to be inequitable that any benefit should be taken by the lord when a merely technical escheat of this kind took place, and various statutes were passed to mitigate or obviate such an inconvenient result. By 39 & 40 Geo. III. c. 88, s. 12, and 59 Geo. III. c. 94, the king is empowered to direct, by warrant under the sign manual, the execution of any trusts or purposes to which lands coming to him by escheat may have been directed to be applied, or to grant such lands to trustees for that purpose. These Acts do not, of course, affect a mesne lord to whom an escheat has fallen, but by 13 & 14 Vict. c. 60 (which repeals 11 Geo. IV. and 1 Will. IV. c. 60; 4 & 5 Will. IV. c. 23, s. 2; and 1 & 2 Vict. c. 69, whereby similar provisions were made) the Court is empowered, where a trustee has died intestate and without an heir and in certain cases where a mortgagee has died without an heir, to make an order vesting the lands in such person, in such manner, and for such estate as it shall direct.

The famous case of *Burgess v. Wheate*, 1 Eden, 177, decided in 1759, deserves attention for more than one reason. After a protracted course of litigation extending over eighteen years, the suit was finally decided by the Lord Keeper, Sir Robert Henley (afterwards Baron Henley and Earl of Northington), with the assistance of Lord Mansfield, C.J., and the Master of the Rolls, Sir Thomas Clarke. Shortly stated, the question was this. A, being seised in fee, conveys to a trustee to hold to such uses as he might appoint. He makes no appointment and dies without leaving any heir capable of inheriting. To whom does the land belong? An information was

filed by the Attorney-General on behalf of the Crown, insisting that the trustee had no beneficial interest, and that in default of appointment or heirs, the trustee held for the king's benefit and ought to convey to the use of the king. The Court, after elaborate argument, was divided in opinion, the Lord Keeper and the Master of the Rolls holding that there was no escheat to the Crown, while the Lord Chief Justice was of a contrary opinion. The judgment of the majority of the Court proceeded upon the ground that the right of escheat is not founded on the want of an heir, but of a tenant to perform the services. Where there is a legal tenant in possession neither the Crown nor a lord can enter or seise; the right to the service of the tenant in possession being all that the Crown or a lord can of right require. The fact that the tenant had no beneficial interest, but was a mere trustee, was held to make no difference. 'The transmutation to a trustee is the same in its consequences as the transmutation of possession without a trust; it conveys to the trustee the legal burthens, and it invests the trustee with the legal privileges.' The Court carefully abstained from saying that the estate *belonged* to the trustee, and put his right only on the negative ground that where the plaintiff has no right, the defendant may hold till a better right appears. Sir Thomas Clarke, indeed, intimated that if it were necessary for the trustee to come into a Court of equity in order actively to assert his right, he would receive no assistance from the Court, and the same view was taken by Lord Loughborough in *Williams v. Lord Lonsdale*, 3 Ves. 752. Practically the property, in cases of this kind, was without an owner, and the right of the trustee could not well be put higher than a right of occupancy which might, by lapse of time, become the foundation of a legal title. If the trustee had the legal estate and was in possession of the property, a Court of equity would not interfere with such possession by ordering a conveyance of the legal estate, at the instance of any one except a claimant through the creator of the trust. To use the old-fashioned phraseology, the Court would not grant a *subpoena* against the feoffee for any who was not in privity with the feoffor; and, therefore, the Crown, not claiming in any privity, could not have a *subpoena*. The contention that the Crown stood in the place of the *cestui que trust* and in some sort of fiduciary relation to the trustee, was rejected by the Lord Keeper. 'My objection,' said he, 'to the claim in the information is, that it is for the execution of a trust that does not exist. Where there is a trust, it should be considered in this Court as the real estate, between the *cestui que trust* and the trustee, and all claiming by or under them; and the trustee should take no beneficial interest that the *cestui que trust* can enjoy; but for my own part, I know no

instance where this Court ever permitted the creation of a trust to affect the right of a third person.' The argument of the two Equity judges who formed the majority of the Court was designed to show that at law there could be no escheat while there was a tenant *de jure*, that in equity there was none while trusts were called uses, and that trusts and uses were essentially the same. The doctrine of equitable escheat that it was attempted to set up, was disapproved of, and the case may be taken to have decided that where there was no escheat at law there could be none in equity.

No better illustration could be given of the feudal basis on which our land laws rest than this case of *Burgess v. Wheate*. No person with a shadow of a claim to the beneficial enjoyment of the property was in existence, and yet the Crown was not allowed to take as lord paramount for the technical reason that a legal tenant was found in the trustee. Lord Mansfield, indeed, attempted in a vigorous judgment to establish the right of the Crown by fixing on trusts the feudal incident of an escheat. Trusts in England, he argued, under the name of uses, began, as they did at Rome, under no other security than the trustee's faith, and it was not until Lord Nottingham held the great seal that they were placed on a true foundation. By steadily pursuing trusts from plain principles, and by some assistance from the legislature, a noble, rational and uniform system of law had been raised; trusts were made to answer the exigencies of families and all other purposes without producing one inconvenience, fraud, or private mischief which the Statute of Henry VIII meant to avoid. The *forum* where they were adjudged was the only difference between trusts and legal estates; *cestui que trust* was actually and absolutely seised of the freehold in consideration of a court of equity; and therefore the legal consequences of an actual seisin of a freehold should follow for the benefit of one in the *post*. This reasoning was said by the Lord Keeper to be very great and noble and very equitably intentioned, but it seems to be fairly open to his criticism that a decision on such grounds would be *jus dare*, not *jus dicere*. Lord Mansfield was upon firmer ground when he argued that the exclusion of the trustee from all benefit was surely in the contemplation of the parties; that it could never have been intended that he should hold to other purposes than on the trusts; and that the least analogy to any legal right ought to be preferred to the trustee, who was the mere form and instrument of conveyance.

Burgess v. Wheate has always remained the leading case upon this point of the law of escheat, though it can scarcely be said to have been a case of first impression. *Sir George Sand's case*, 2 Freem. 129,

decided (in 1669) that there was no escheat of lands on the attainder of *cestui que trust* for felony, for escheat was only *ob defectum tenentis*, and in this case the king or lord had his tenant as before, namely, the feoffee in trust, who was to be attendant for the services to the king or lord. This case was much relied on in *Burgess v. Wheate*, and was followed by the Court. Still, *Burgess v. Wheate* was elaborately argued as a question of principle, and the luminous judgments delivered by the three great lawyers who formed the Court will always be studied with profit by the student of legal history. The principle there established has been carried to a greater extent in some modern cases. *Henchman v. A. G.*, 3 M. and K. 485, was decided in 1834. A testator devised copyhold land in fee upon condition that the devisee should pay £2000 to testator's executor, to be applied, after payment of debts and legacies, to charitable purposes. The testator died without leaving any customary heir or next of kin. It was held by Lord Brougham that the proportion of the £2000, which was void by the Mortmain Act, was to be considered as real estate undisposed of, and that the devisee, and not the Crown, was entitled to it. Whether this decision was correct or not may be open to doubt, but there is no question that the judgment was couched in singularly infelicitous terms, and some reference will shortly be made to it. In 1844 the case of *Taylor v. Haygarth*, 14 Sim. 8, came before Shadwell, V. C. A testatrix devised real estate to trustees *in trust to sell the same immediately after her death*, and to stand possessed of the proceeds in trust for such persons as she should direct by a codicil. She made no codicil, and died without leaving any heir. After her death the trustees sold the real estate, and it was held that they were entitled to the proceeds for their own benefit. The principle was applied in 1853 to the case of a mortgage in *Beale v. Symonds*, 16 Beav. 406. In that case Lord Romilly, M. R., held that where a person made a mortgage in fee and died intestate and without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgagor's debts. It is to be remarked that the three cases last cited go further than *Burgess v. Wheate*, and state in terms that the devisee, the trustee or the mortgagee was *entitled* to the land, that it belonged to him. The distinction is not a mere refinement of expression, and might have been of considerable importance had the Intestates Estates Act, 1884, not been passed.

But although *Burgess v. Wheate* has been often followed, its authority was long considered doubtful by the profession, and was never definitely established. The great weight of Lord Mansfield's authority was against it from the beginning. The claim of the

Crown, it is to be noted, was based solely upon the feudal incident of escheat. 'A better ground in favour of the claim of the Crown might perhaps have been found, by resorting to its acknowledged prerogative of being entitled to the *bona vacantia*, or every species of property of which no owner is discoverable' (Mr. Butler's note, Co. Litt. 191 a). The case of *Middleton v. Spicer*, 1 Bro. Ch. Rep. 201 (1783) was upon the claim of the Crown to all property to which there is no other claimant. The king, argued the Attorney-General (Lord Loughborough), is owner of everything which has no other owner. In that case, a man died possessed of leasehold property which he ordered to be sold and the money paid to a charity. The statute of Mortmain prevented the charity from taking. A legacy was given to the executor, and there were no next of kin. It was held that the executor was a trustee for the Crown. It is true that the estate in this case was personal property, and that a distinction may be made on that ground. But Lord Thurlow in his judgment said he did not see how the case was distinguishable in principle from *Burgess v. Wheate*. Where there was a trustee the general rule of the Court was that he could have no other title. The argument of the defect of a tenant seemed to be a scanty one. The executor having a legacy bequeathed to him and being clearly a trustee, could not, *by any possibility*, take any beneficial interest. In *Viscount Downe v. Morris*, 3 Hare 394 (1844), the lord of a manor taking by escheat, on the death of a tenant without heirs, the fee simple of lands holden of the manor, but subject to a demise by way of mortgage for a term of years created by the tenant, was held entitled in equity as against the mortgagee to redeem the term. In a careful judgment, Wigram, V. C., contested the proposition that a *subpoena* would in no case lie for the lord by escheat in assertion of a mere equitable title; or, in other words, that the Court could only have regard to the dry legal rights of the parties. 'It is one thing,' said the Vice-Chancellor, 'to say that where the tenant has aliened his whole estate at law and thereby ceased to be tenant, there shall be no escheat on his death without heirs; and another to say that the lord, taking lands by escheat, is bound by an alienation of the tenant for a term of years further or otherwise than the tenant himself was bound.' The doctrine that the Crown comes under no head of equity, and that it cannot enforce any equitable right whatever, was also condemned by Lord Romilly, M.R., in *Barrow v. Wadkin*, 24 Beav. 1 (1857), where it was decided that a trust of real estate created in favour of an alien, would be enforced for the benefit of the Crown. The devise being valid, and there being a *cestui que trust* who could take but not hold, the Crown became entitled beneficially, and not the trustee

or heir at law. It is true that in cases of alienage the Crown took by prerogative, and the feudal rules applied to escheats had no application, but all the cases on escheat were reviewed by the Master of the Rolls, who criticised *Burgess v. Wheate* unfavourably, though he had followed it four years before in *Beale v. Symonds*. 'The question there decided,' said he, 'may possibly be considered as not finally concluded, if it should ever come again to be considered.' Adverting to the want of title in the trustee, Lord Romilly said that, as it seemed there was no one having any right to the land, it would be difficult to hold that the Crown would not be entitled to take it as a vacant possession. Cases were enumerated in which the right of the Crown to enforce a trust of personal estate had been established, and the learned judge expressed himself unable to comprehend any distinction between such cases and the case of a trust of land. It is known that the late Sir George Jessel entertained an opinion that *Burgess v. Wheate* was not rightly decided, and in *Sharp v. St. Sauveur*, 7 Ch. App. 352, he stated in argument that that case, if necessary, might well be questioned. In an opinion written when at the bar in 1872, the late Master of the Rolls said:—'I have long considered that on principle the Crown was entitled to equitable estates as *bona vacantia*. *Burgess v. Wheate* has been long followed as if it decided that the Crown had no title at all, although the only point really discussed and decided by the judgment was that the Crown had no title by escheat.' In a case already referred to (*Henchman v. A. G.*), Lord Brougham dismissed almost without consideration the argument that the Crown could take real estate by prerogative, as distinct from escheat. 'The Crown has no such prerogative; it may take personalty as *bona vacantia*, but real estate it can never take unless by escheat. Such a prerogative is contrary to the plainest and most fundamental principles governing English tenures.' The learned Chancellor appears to have entirely overlooked the case of alienage in which the Crown constantly took real estate by prerogative, and also the king's undoubted prerogative as universal occupant, by virtue of which he is entitled to all derelict lands. See *Exp. Lord Gwydir and another*, 4 Madd. 281. The contention that *bona vacantia* were matters of a purely personal nature was also advanced in argument in *Taylor v. Haygarth*.

After a struggling existence of a century and a quarter, the principle of *Burgess v. Wheate* was reversed by statutory enactment in 1884. Section 4 of the Intestates Estates Act, as already mentioned, applies the law of escheat to incorporeal hereditaments and to equitable estates in corporeal hereditaments. The section is not retrospective, and the old law will therefore continue to be of

importance for some time to come. It is submitted that this is for many reasons an unsatisfactory mode of settling the question. The difficulty of applying the feudal incident of escheat to things not lying in tenure has been already noticed. Then there was no reason why the mesne lord should have the equitable interest of an heirless man any more than the trustee. It would have been a better course, on the contrary, to apply to equitable as well as to legal estates the recommendation of the Real Property Commissioners (Third Report, 1832), that in all cases on failure of heirs and devisees, land of freehold tenure, unless where a quit-rent was actually payable to some person as immediate lord, should escheat to the Crown. The loss of the contingent benefit, it was said, could not be felt by any intermediate lord, the chance being so remote that it did not admit of being valued. But, it is submitted, the true solution of the question is entirely independent of the law of escheat, and is to be sought in a judicious extension of the prerogatives of the Crown. What was wanted was an Act giving validity to the proposition that the Crown is entitled to all property, real as well as personal, and whether the estate or interest is legal or equitable, that may be without any capable owner, whether there is or not any person in possession, by claim of right or otherwise. Where the possession is vacant there is no doubt the Crown is entitled. By the common law, it is said (Gilb. Exch. 110), where lands belong to nobody, the king's officers may enter, because by the law the land is in the Crown: for the law entitles him [the king] where the property is in no man.

Where a person seised of lands in fee dies intestate and without heirs, and no mesne lord is proved to exist, the right of escheat at once accrues to the Crown, and the title and possession are cast upon the king at common law. Notwithstanding the doubts expressed by Lord Ellenborough (12 East, 109, 110), it is believed to be the better opinion that an inquest of office is only a proceeding to ascertain the title of the Crown by escheat, and not an essential condition to the vesting of such title, 'or else the freehold should be in suspense, which may not be' (Staunf. Prerog. 54 a). But the law vests in the king nothing more than a bare right, and no beneficial enjoyment of the property can in general be had until after office found. It is laid down that the king's title must appear of record: 'and this was a part of the liberty of England that the king's officers might not enter upon other men's possessions, till the jury had found the king's title' (Gilb. Exch. 109). In all cases where a common person cannot have a possession, neither in deed nor in law, without an entry, the king cannot have it without an office or other record. This principle, it is believed, is not affected

by 22 & 23 Vict. c. 21, s. 25, which relates to rights of *re-entry*, though the contrary is stated in 3 St. Com. 694, 10th ed. When the limits of the prerogative were much less accurately defined than they now are, the interposition of such a barrier between the subject and the Crown may well have been necessary. It had become the practice of the Crown, in very early times, to make grants of escheated and forfeited lands, sometimes before office found, and at other times before returning the inquisition into Chancery or the Exchequer. By this means any true owner of the land was deprived of the opportunity of contesting the title of the Crown. Two statutes were passed to remedy this grievance, 8 Hen. VI. c. 16 and 18 Hen. VI. c. 6, by the first of which it was enacted that the Crown should not lease lands seised upon inquest before escheators or commissioners until a month after the return of the inquest, unless to persons tendering a traverse and disclosing a *prima facie* right. The second statute provided that no grant of such lands should be made by the king by Letters Patent (then the only mode of grant) until office found and returned, if the king's title were not of record; nor within the month after such return, unless to the traverser. The king's title may appear in some other shape of record, as in the case of his known tenants *in capite*, and an office is then unnecessary to enable the Crown to make a valid grant or lease. This case is probably not affected by section 2 (3) of the Escheat (Procedure) Act, 1887. But the instances in which the Crown may seise and dispose of lands without a previous finding of its title by inquisition, are believed to be very few, and in practice an office of Instruction would always be taken.

An inquisition or inquest of office is defined to be an inquiry made by the king's officer, his sheriff, coroner or escheator, *virtute officii* or by writ sent to him for that purpose, or by commissioners specially appointed, by means of a jury either consisting of twelve, or less or more, concerning any matter relating to the king's title to possession of lands or tenements, goods or chattels. Manning says (Exch. Prac. 87) that the jury must now consist of twelve. Since the practical abandonment of the prerogative relating to wreck and the almost entire abolition of forfeitures for offences, inquests of office have been seldom resorted to except in cases of alleged escheat of lands, though it is possible that it may still be necessary to resort to this procedure in a case of treasure trove, where difficulty is experienced in following or obtaining possession of the treasure. The procedure by inquisition was introduced by the Normans at the Conquest, and steadily superseded the old purely verbal procedure. It soon developed into the possessory and petitory actions of real property law, and contained the begin-

nings of the modern jury system. The procedure to entitle the king to some possession has continued to bear the original name, and still adheres closely to the original form. While military tenures were in existence, inquests of office were more frequently employed than at present; for upon the death of every of the king's tenants an inquest of office, called an *inquisitio post mortem*, was held, to inquire of what lands he died seised, who was his heir and of what age, in order to entitle the king to his marriage, relief, primer seisin or other feudal advantages, as well as to a possible escheat. There were two sorts of offices, one of *Intituling* and another of *Instruction*. The former issued in cases where an office is necessary to entitle the king, and the commission for taking it always issued out of Chancery under the great seal, as the king cannot take but by matter of record. Even where the king was entitled of record in some other way, an office was always taken before seisure, for the better instruction of the king's officer and in favour of the subject, that the king might not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury. The office in this case was called an office of Instruction, and was taken by virtue of a writ issuing from the Court of Exchequer, or, where the lands were under the value of £5 per annum, the king's escheator might have held an inquisition of his own accord and *virtute officii*.

The effect of an office found for the king is to put him in immediate possession, without the trouble of a formal entry, provided the subject in a like case would have had a right to enter. If the possession were not vacant at the time of the office found, the king must enter or seise by his officer before the possession in deed shall be judged in him. It is a general rule that in all cases where a common person cannot enter, but is driven to his action, there the king cannot have the possession but by like action, or by *scire facias*, or information of intrusion. After office found the king is entitled to receive all the mesne or intermediate profits of the land from the time his title accrued. In the interval between the death of the last owner and the establishment of a title by escheat, the property is not under the control of any one. There is no authority in the Crown or any other claimant to receive or distrain for the rents, to admit new tenants or to eject squatters upon the land. The result is that the mesne profits are often lost. This inconvenience might well be obviated by giving to the Crown's nominee the powers of an interim curator. No claimant of the property would object to the adoption of this course, as it would be to the manifest benefit of all that a responsible official should receive the income of the land, on account of the person whose title should be eventually

established. An arrangement of this nature might probably be dealt with, as a matter of procedure, under the power to make rules given by the Escheat (Procedure) Act, 1887.

If the office be found against the king, a *melius inquirendum*, as already mentioned, may be awarded. But in good discretion this should not be done without sight of some record, or other pregnant matter for the king, to show the former office was mistaken. If the *melius inquirendum* be found against the king, he is thereby precluded from having another *melius inquirendum*. Where the office is found for the king, any person aggrieved may present a petition to the Court for leave to traverse the inquisition, accompanied by an affidavit showing the grounds of the traverse. Should the facts set forth in the affidavit show a *prima facie* title in the claimant, leave will not be refused. The claimant then delivers his traverse in which he sets forth the grounds of his own title, and prays that the inquisition may be quashed and the king's hands amoved from the lands. The claim of the traverser will usually be either as heir at law of the last tenant, or as a mesne lord or other person entitled to the immediate seignory of the lands. The next step in the proceedings will probably be a summons taken out by the Attorney-General for the delivery of particulars of the title of the traverser. A replication is then delivered on behalf of the Attorney-General, and the pleadings are usually closed by a rejoinder from the traverser. The case is then set down for trial in the ordinary way. It will often happen that the matters in dispute are questions of law only, and in such an event a special case is the most convenient mode of dealing with them. If the Attorney-General is of opinion that the traverser has made out his case on the pleadings, he will usually deliver a confession of the traverse, so as to save the traverser unnecessary trouble and expense. Where the traverser succeeds, judgment will be entered that the inquisition be quashed and that the king's hands from the possession of the premises be amoved, and that the traverser be restored to the possession, together with the rents and profits from the time of the taking of the inquisition and in the meantime received. This judgment of *amoveas manus* will not, however, entitle the traverser to the mesne profits actually paid over for the king's use under the inquisition. 'The money being once in the king's coffers shall not be restored,' 2 Inst. 572.

Escheators were officers of the king whose duties were generally to ascertain what escheats had taken place, and to prosecute the claim of the sovereign for the purpose of recovering escheated property. The sheriffs often undertook the office of escheator in their counties, and after the appointment of separate escheators

the sheriffs long accounted for the smaller escheats. When escheats came to the Crown, it seems that the Justices Itinerant took care within their several circuits to have them seised for the Crown and put in charge to sheriffs or other officers for the king's profit. Towards the end of the reign of Henry II the practice arose of grouping several counties together as an *Escheatry*, and the Escheatrics were managed by officers called at first *Custodes Escheatarum* or *Escheatrae* and afterwards *Escheatours*. The Escheatrics seem to have varied greatly in importance and extent, consisting at different periods of two, three, or four counties. This mode of division existed certainly down to the end of the reign of Henry VIII, but in an intermittent fashion, for by the commencement of the reign of Edward I, we find but two Escheators in England, one on this side of Trent and the other beyond Trent, though sub-escheators were also employed. Lord Coke says that in the reign of Edward II the offices were divided, several escheators made in every county, and so continued until the reign of Edward III. And afterwards by the statute 14 Edw. III. st. 1, c. 8, it was enacted that there should be as many escheators assigned as when Edward III came to the Crown, and that was one in every county. But this statement seems scarcely accurate, for an escheator beyond Trent certainly existed in the ninth year of Edward II and in the sixth year of Edward III. The truth perhaps was that the rapacity of the escheators frequently gave rise to grievous complaints, and the king, in consequence, often varied the mode of their appointment and the extent of their jurisdiction. The escheators were the officers usually employed to take inquisitions for the king, but this seems to have been sometimes done by commissioners specially named for the purpose, and in many of the statutes on the subject, commencing with the Statute of Marlbridge, 52 Hen. III. c. 18, commissioners are named in the alternative with escheators. By the time of Elizabeth, the feudal system was in a state of incipient decay. Its technical phraseology was imperfectly understood, and the functions of its officers had become partially obsolete. By the middle of that Queen's reign the practice of issuing special commissions to five or six persons to take inquests of office seems to have been frequently adopted, one of such commissioners being sometimes the escheator for the county. The escheators were under the control of the Court of Wards and Liveries which was instituted by the statute 32 Hen. VIII. c. 46, for the superintendence and regulation of the king's revenue from feudal sources, and on the abolition of that Court by the famous statute 12 Car. II. c. 24, together with the oppressive tenures on which it was founded, the office of escheator became of

little use, and soon ceased to be filled up. No adequate provision was then made for the discovery of escheats, but when cases came to the knowledge of the king's officers, special commissions were issued for the taking of the inquest. This practice is in use at the present time, except where the procedure authorised by Section 5 or Section 6 of the Intestates Estates Act, 1884, which will be referred to subsequently, is put in force. When information sufficient to justify proceedings is obtained by the Solicitor to the Treasury, a commission issues, with the approval of the Law Officers of the Crown, directing inquiries whether the person whose estate is in question died without leaving any heir and without having devised his lands, when and where he died, what lands he had in the county at the time of his death and of what annual value, of whom the same lands were holden and by what services, who has received the mesne profits thereof since his death and to what amount, and in whose possession the said lands then are. (See *Doe v. Redfern*, 12 East, 97.)

Many statutory provisions were made from time to time to prevent abuses in the mode of taking inquests of office. Thus the Escheator was to hold his office only for a year, and was not eligible to serve again for three years; a property qualification was necessary both for him and for the jurors; inquests were to be taken 'of good people and lawful, which be sufficiently inherited and of good fame,' and of the same county where the inquiry should be; escheators were to sit in good towns, in convenient and open places and not privily, and to suffer every person to give evidence openly in their presence; a counterpart of the inquisition was to be delivered to the first person sworn of the jury, with him to remain to the intent that the Commissioner or Escheator may not change or 'enbesyll' the said offices or inquisitions; and elaborate provision was made to ensure that the offices found should be returned into the king's Courts without alteration. Where lands were situate in different counties, a separate inquest for each county must be taken.

Nothing has been said as to the procedure by which the title of a mesne lord or other private person entitled to the seignory of the land would be established. If the Crown made a claim, the mesne lord could of course appear at the holding of the inquisition, and the jury might then find in his favour. If the finding were in favour of the Crown, it might be traversed by the mesne lord. Should no action be taken by the Crown, it is conceived that the remedy of the mesne lord, since the abolition of the writ of escheat by 3 & 4 Will. IV. c. 27, s. 37, will be by an ordinary action to recover the land from the person in possession.

The jealous watchfulness against any extension of the right of the Crown to escheats, which once existed, has now in a great measure passed away, and the tendency of modern legislation is to enlarge the Crown's right. This change in public sentiment has been largely brought about by the practice which has obtained since the reign of George III of passing a Civil List Act on the accession of each sovereign, under which the hereditary casual revenues of the Crown are carried to the Consolidated Fund instead of to the privy purse of the sovereign. Acts, too, have been passed (39 & 40 Geo. III. c. 88, s. 12, and 59 Geo. III. c. 94) enabling the Crown, when entitled by escheat, to make grants of the escheated lands, for the purpose of restoring the same to any of the family of the person whose estates the same had been, or of carrying into effect any intended grant, conveyance or devise of any such person in relation thereto, or of rewarding any person or his family making discovery of any such escheat.

Sections 5 & 6 of the Intestates Estates Act, 1884, have introduced exceptions to the rule that the Crown's title must always appear of record. It frequently happens that the title of the Crown first becomes known in the course of an administration or other action, and in such a case, in order to save the cost of again finding the Crown's title in a formal manner, it is provided (47 & 48 Vict. c. 71, s. 5) that the Court may, with the consent of the Attorney-General, order a sale and direct the proceeds to be paid to a nominee of the Crown, notwithstanding that no office has been found and no commission issued or executed. A more serious inroad upon the old rule is made by section 6 of the same Act. Where an application is made for a waiver of the Crown's right to escheated lands by a person to whom a grant might be made under 59 Geo. III. c. 94, such waiver may be authorised by two lords of the Treasury, and the Treasury Solicitor may thereupon execute a conveyance of the land, which has the same effect as a grant from the Crown after office found. Any claimant may, however, on giving security, demand an inquisition within two years, and the right of traverse is fully reserved.

It is suggested that the time has now come for a more sweeping change still, and that proceedings by inquest of office to find the title of the Crown, might with advantage be entirely abolished. This procedure was established soon after the Conquest, when feudal tenures were in full vigour, and was appropriate enough where the question lay between a rapacious lord, anxious to press his rights to the full, and persons claiming under the tenant. It secured a certain publicity in the county, and the necessity for a verdict of a jury was a useful protection to the subject. The pro-

cedure by inquisition is now obsolete and ineffective. A precept from one of the special commissioners requires the sheriff to empanel a jury of twelve, and the proceedings take place in a room in the Town Hall or other public building of a town in the neighbourhood of the lands in question. Sometimes, when such a place cannot conveniently be made use of, the Court is held in a room of a hotel. Few persons attend besides those immediately concerned as jurors or witnesses, and the proceedings attract little notice from anyone. Occasionally, the local papers contain a short account of the matter. It is therefore clear that the procedure no longer effects many of the objects for which it was devised, and the question arises whether some simpler and more effective method might not now be adopted, and at the same time a very considerable saving of expense be brought about.

Even if, as rarely happens, some claimant appears and opposes the finding of the Crown's title, the cumbrous machinery of the inquest does not readily lend itself to his aid. If notice has previously been given to the Crown of any such claim, it will be investigated by the advisers of the Crown before the inquest is held, and if thought by them to be well founded, probably the proceedings would be entirely dropped, and no inquest would take place. Should the claim be considered not to have been made out, it can hardly be gone into with any care at the inquisition. Where no notice of any claim has been given to the Crown (and there is, of course, no obligation to do this) it is practically impossible to go into a complicated question of pedigree or of manorial rights without previous preparation involving the delivery of pleadings, so as to define the issues to be decided. It is therefore almost inevitable that in cases where claims are first put forward at the inquest, the jury should be directed by the commissioners to find the title of the Crown, and the claimant should be left to his remedy of traversing the inquisition, in which case the whole ground has to be gone over again. Inquests of office have accordingly become almost entirely formal, and are no longer of much service in bringing the matter to the notice of possible claimants. Where the lord takes by escheat on the death of any person other than a bastard, it is probable that his claim is admitted, not because there are no heirs, but because they are unaware of their rights, and the amount of publicity attaching to proceedings by inquest of office is not sufficient to bring the matter effectually to their notice. It is believed that there would be no objection on the part of the advisers of the Crown to any alteration in the practice of finding the Crown's title that would be better calculated to apprise unknown relations of their rights. The best

method of effecting this object, and at the same time of simplifying and cheapening the procedure in cases of escheat, that occurs to the writer, would be the institution of an action in one of the ordinary tribunals, for a declaration of the title of the Crown, or the mesne lord or other private person entitled to the escheated property. The Court might be empowered to make such a declaration on the expiration of a limited time after the insertion in the public newspapers of a statement setting out the circumstances, and calling upon the heirs or other persons having any right to make their claims. A practice similar to the above has long been followed in cases where the Crown seeks a grant of administration of the personal estate of any one who has died intestate and without known kin, and has frequently been found to be the means of apprising next of kin of rights before unknown to them. It is believed that some such system might be extended to the escheat of real estate with the best results. If considered desirable that questions of fact arising on the pleadings in any case should still be tried in the county, provision may be made for this to be done at *nisi prius*. The machinery of the County Court might perhaps be employed in the taking of inquiries of this kind, whether with or without a limit to the jurisdiction based on the value of the property in question. By thus making use of existing judicial machinery, a considerable saving in cost would be effected. Under the present practice, the cost of finding the title of the Crown is never less than £60 or £70. In cases of difficulty it would amount to much more than this, and indeed in 1832 the cost of an ordinary *inquisitio post mortem* and subsequent grant was put at £300 (Third Report of R. P. Commissioners, Appendix, p. 10).

Other reasons in favour of some such changes as those now recommended might be given, but it is not the writer's object to do more in this place than offer suggestions for the consideration of the profession and of others interested in the amendment of the law. In the course of this article several amendments, both of the law and practice in cases of escheat, have been suggested, and though they can hardly be said to be of a pressing nature, yet it is believed that a revision of the whole subject, with a view to legislation, is desirable, for the improvement of the form, as well as the substance, of the law. If, as seems likely, codification, to be effected at all, must be done piecemeal for particular branches of law and by private enterprise, the law of escheat is recommended as a tempting subject for experiment.

FREDERIC W. HARDMAN.

ENGLISH AUTHORS AND AMERICAN COPYRIGHT.

AT last and after much hope deferred the British author appears to be on the verge of his Promised Land, and to be approaching the day when the vast body of readers in the United States of America who have hitherto paid him the compliment of reading his works shall pay him for the privilege not in compliments but in cash. A Bill which promises to bring about this desirable result passed the American Senate on May 10, by thirty-five votes to ten, and has been approved by the Judicial Committee of the House of Representatives. It also has the support of the Typographical Union, an organisation of American printers most powerful in lobbying and other occult arts; it is warmly approved by American authors; its rejection does not appear to promise sufficient party capital to make it worth while to offer up the measure on the altar of the Presidential election; and the President is certain to pass it, should it be submitted to him. All seems well; and we can hardly be accused of counting our legislative chicken before he is hatched, if we give a short account of what the Bill is, and what change it is making in the law; why the British author is rejoicing, and wherefore British printers and publishers are wringing their hands.

It is hardly necessary to say that no person not a citizen of the United States or resident therein has hitherto possessed any copyright for literary, dramatic, or artistic work in the United States. The American public have enjoyed all the leading English books without contributing anything to the real author of their enjoyment; and American authors have led even more miserable lives than authors are reputed to do, for they have had to compete with productions of their English brethren, sold at a price which left no margin for the remuneration of the author. Mark Twain is reported to have given up hope of earning his living by writing his own books, and to have sought it in publishing other people's. For publishers who have not to pay an author anything, who are freed even the trouble of making up an annual statement showing a balance to the author's debit, naturally may hope for profit.

And at first American publishers obtained it. But publishing in the United States has gone through a curious evolution, which seemed likely to end at one time in its financial ruin. At first all English literature lay open to all American publishers, and, like the busy bee, they flitted from author to author, publishing his successful works for his fame and their own profit. But while a publisher

saw no objection to printing an English work without paying its author, it was obviously inconvenient when the same idea occurred to a brother publisher and there were two Richmonds in the field, two cheap editions in the market. Hence wars and rumours of wars, competing editions and cutting down of prices, to the public benefit and the publisher's loss. 'A state of nature was a state of war.'

From this state of war came, as according to Hobbes it should have come, a social contract. The ingenious publisher invented a copyright which had the advantage of protecting his publication, while it was free from the disadvantage of requiring any payment to the author of the work published. It was called 'the courtesy of the trade,' and consisted in an 'honourable understanding' (honour, we know, exists in the most unlikely regions), by which the first publisher of an English work in the States was protected from competition by his more tardy brethren. The early publisher picked up the worm of a courtesy copyright. Under this system English authors obtained some slight advantage, for as it was of importance to be first in the field in the States, 'advance-sheets' of the English work became a profitable investment for the American publisher, and in some cases considerable sums were paid for them.

This happy time did not last long; there arose a race of publishers in the United States who had no 'courtesy,' and who did not see the beauty of 'honourable understandings.' And in the form of Riverside and Lakeside Libraries, and other attractive titles, they published everybody's books right and left, paying no heed to priority of publication or to the competing editions of their rivals. Such was the internecine war waged between publishing firms that most books in the United States appeared to be sold at a loss, the publishers saying, like the old French lady, *Je me sauve sur la quantité*. This course of universal revenge was likely to end in universal ruin, and hence publishers gladly welcomed a prospect by which every man could sit under his own literary vine and fig-tree, no competing edition making him afraid.

American authors had long been of the same opinion; for it was all but impossible for a man in America to live by literature alone in face of the competition from English works produced at enormous advantage which his poor books must struggle against.

One formidable interest remained to be conciliated. The printers feared that if copyright could be acquired by English authors, the American demand for English works would be supplied by English editions, and the cheap employment of American printers, the setting up English works from the printed works themselves, would be gone. And they were able to gild this private interest with the attractive

covering of a desire for the public weal, pointing out to the American public, which is used to and likes its books cheap, that a monopoly to English editions would mean an enormous increase in price, and the adoption of the fictitious values induced by the English circulating library. And indeed the prospect of the importation of the English three-volume novel nominally published at one guinea and a half might well rank with Chinese immigration as a national evil. From these motives and with these arguments, the Typographical Union was powerful enough to slay all legislation.

One proposal to meet the difficulty was a royalty system by which any publisher might produce an English work on paying a certain royalty to the author, and a curious system of stamps was devised to carry out this arrangement. But though this gave the author his reward, it gave the publisher no security from competing editions, and as it aroused no enthusiasm in anybody, it failed to achieve any success.

Another suggestion, more fortunate, is embodied in the present Bill. If it becomes law any English author can obtain copyright for a book of his in the United States, provided that before publication of such work anywhere he shall deliver two copies of such book to the Librarian of Congress at Washington, *and such copies must be printed from type set within the limits of the United States.* If he does not do this before publication in England or elsewhere, he can obtain no copyright in the United States. If he does do this, his authorised edition will be protected in the United States from competition, and can obtain therefore a monopoly price. The words in italics, which constitute the gist of the whole measure, are of course the sop to the American printers. Under that clause, any book for which there is a considerable demand in the United States can be printed by them either as pirates, or under the sanction of the author; books for which there is no considerable demand they do not want to print. Their interests are further safeguarded by a clause protecting the American copyright edition from the competition even of an English copyright edition; so that briefly the American demand for books must be supplied by American printers, if they wish to supply it, and if that is done the American printer is willing to pay the English author in return for a monopoly of printing his work.

How will this affect English authors? In the first place, it will only assist those writers the success of whose books is so probable that they can afford to arrange for an American edition in making their plans for first publication. Works of an unknown author, which spring into celebrity by leaps and bounds, will probably reap no benefit from the new Bill, unless their author is sufficiently

confident and daring, their publisher sufficiently discerning and adventurous, to risk an English as well as an American edition. It is very doubtful whether the authors of John Inglesant, Robert Elsmere, King Solomon's Mines, Vice Versa, and other works of wide circulation, would have reaped from those works any benefit from their American sale under the new Bill, though second works by these authors could obtain protection in the American market, together with the additional price that their former successes would obtain for them. To the successful English author the Bill will probably bring increased fruits of success; to the obscure author, it is valueless. That class of writers for whose works there is a small but genuine demand in the States, so small that they are not worth pirating, but so genuine as to send orders to England, will not be affected in any way by the Bill. On the whole, therefore, the British author gets some benefit, and loses nothing by the Bill; indeed, he had nothing to lose.

The English publisher however may be very seriously affected, and has already raised a wail of despair. It is not merely that he is cut off from the American market; he had no substantial hold on it before, and he has not even the privilege of sending over his stereotype plates for the American edition, for the work must be set up in type in the States. But he may lose the English market as well. To get American copyright, the author must begin with an edition of American manufacture; but there is no corresponding restriction on his English copyright; why then, he may ask himself, should he print a second edition in England? He has only to print a larger number of copies of the American edition and import them into England, which at the present rate of American freights is not expensive, and he has saved all the expense of a second printing and publishing, and has only the English distribution to see to. And as the English author is not disposed to sacrifice himself on the altar of the English publisher to any greater extent than is necessary, this system of American manufacture seems likely to become prevalent among successful English authors, and English printers and publishers are correspondingly depressed.

The English author is to a certain extent the master of this situation. Strongly prejudiced as he is in favour of Lord Byron's celebrated emendation, 'Now Barabbas was a publisher,' he is hardly likely to go out of his way to assist his suffering but publishing countryman. The remedy lies with publishers themselves; they must make it worth while for English authors to publish in England. They must revise their iniquitous 'half-profits system,' so called because the publisher gets about two-thirds of the profits; they must overhaul their system of discounts and allowances, and

trade copies and accounts ; and they must treat their author as a genuine partner in the joint adventure.

To the English author, the American Copyright Bill brings nothing but profit, though it might be more heavily laden with that good thing ; and he may well be thankful to American authors, and to some few enlightening American publishing firms, to whose exertions it is chiefly owing that the Bill seems so near its haven as a part of the Code of the United States.

T. E. SCRUTTON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

We are compelled by the pressure of leading articles on our space to postpone till the October number the publication of several reviews of books.

A Compendium of the Law of Torts specially adapted for the use of students. By HUGH FRASER. London: Reeves & Turner. 1888. Sm. 8vo. xviii and 144 pp.

THIS book is the analysis of a course of lectures delivered for the Liverpool Board of Legal Studies. In the main it is a clear and sound summary, and we are glad to see that the author strongly warns his readers against attempting to use it as a cram-book, and recommends them to study the law in the cases—the only method of attaining real knowledge. We make a few critical notes in the hope that they may at the proper time help to make a useful manual more useful.

In the matter of general arrangement it is tempting to put 'Liability for the wrongs of others' towards the end, on account of the difficulties attending parts of the topic. But liability for the acts and defaults of servants is assumed and exemplified in a large proportion of the cases on every branch of the law of torts; therefore, if the discussion of it is postponed, there should be some preliminary general statement. As to wrongs to property, Mr. Fraser might perhaps have given more clearness and weight to the fundamental distinction that trespass is essentially a wrong to an actual possessor, conversion a wrong to the 'true owner,' i. e. the person immediately entitled to possession. These two characters may and very often do coincide, but they also may not coincide and often do not. The complications arising from 'constructive possession,' i. e. from the extension of strictly possessory remedies in favour of owners out of possession but entitled to the immediate possession, should be introduced only when the leading principles have been grasped. In the definition of conversion as 'the removal of goods from the possession of another with the design of depriving that other of them,' etc., it seems to be implied that conversion always includes trespass, which is not the case. There is a smaller verbal slip in defining recaption as the right of a true owner to 'lawfully restrain [detain?] and take' his goods: it is of course the act of retaking, not the right. Then Mr. Fraser has invented a quaint kind of property when under the head of slander he speaks incidentally of 'the present possession of an infectious or contagious disease.' We have known a learned friend esoin himself from keeping an appointment for a walk *quia seisitus fuit de uno valde magno frigore*, but we doubt if it was well pleaded. If colds, not to mention greater matters, were capable of asportation, the persons afflicted with the 'present possession' of them would be more than content

to wink at larceny. By the way, trespass *de bonis asportatis* is not co-extensive with trespass to goods, though Mr. Fraser seems to say it is. Breaking a window or scratching the panel of a carriage is a trespass but not an asportation. As for the things a sixteenth-century pleader in the Court of a Lord of Misrule might have made of Mr. Fraser's hint, we leave them to the reflections of the curious.

Our author approves the definition of libel in the draft Civil Code of New York. It chiefly shows to our mind that the maker of it did not understand the law of privileged communications. To define a libel as 'a false and unprivileged publication' is to ignore the reason why certain communications are said to be privileged. They are libellous in their nature, but specially justified; whereas a true statement, or a fair comment on matter of public interest, is not a libel at all, and does not need special justification. Defamation is much better defined in the Indian Penal Code, though not with the same ambition of elegance and generality. We are not quite satisfied with Mr. Fraser's explanation of so-called 'malice in law.' First, Lord Blackburn's exposition of the true doctrine in *Capital and Counties Bank v. Henty* is ample warrant for not using the term at all. Secondly, Mr. Fraser's gloss, 'the intention of doing a wrongful act without just cause or excuse,' is not unlikely to mislead beginners. He really means the intention of doing an act which in fact (whether the actor knows it or not) is the breach of a general legal duty; but the student may think he means the intention of doing an act which the actor knows to be wrongful. Mr. Fraser correctly states that this kind of malice is not enough to support an action for malicious prosecution. But we are surprised that he does not cite the latest and most authoritative exposition of this point, *Abrath v. N. E. R. Co.* in the Court of Appeal, where it is said by Bowen L. J. (11 Q. B. Div. at p. 455) that the plaintiff in such an action must prove that the defendant acted 'from an indirect and improper motive, and not in furtherance of justice.'

In the account of negligence we think that *Tuff v. Warman*, the leading case which chiefly put the doctrine of contributory negligence on its true footing, ought to have been more prominent. And it is quite incorrect to suppose, as Mr. Fraser apparently does, that the rule in *Rylands v. Fletcher* is generally accepted in America.

There are various points of detail and language which call for correction or revision. Distress damage feasant, for example, is not limited to cattle; and careful examination of the report of *Bird v. Holbrook* will show that the cause was tried before, though the decision of the full Court was given after, the passing of the Act against setting spring-guns. In this last point, however, Mr. Fraser has erred in company with a recent book which he not unfrequently refers to, and which may have misled him even with the report before him.

Finally, it seems at least open to doubt whether textual quotations from books not of authority should ever be introduced in elementary works. The difference between that which is of authority and that which is not cannot be too soon or too emphatically impressed on students; and if they are encouraged or allowed to take definitions and rules of law ready-made from text-books, instead of regarding them as material for critical comparison with the authorities, they will scarcely be brought to form accurate habits of work.

A Treatise upon the Law of Extradition, with the Conventions upon the subject existing between England and Foreign Nations, and the cases decided thereon. By SIR EDWARD CLARKE, Knt., H. M. Solicitor-General: formerly Tancred Student of Lincoln's Inn. Third Edition. London: Stevens & Haynes. 1888. 8vo. xx, 226 and cclxx pp.

THE production of legal text-books is the outcome, as a rule, of very different gifts of nature and fortune from those which lead to the highest honours of the profession. The work before us is, however, a third edition, and on its first appearance, in 1866, the marvel was not that Mr. Clarke had found time to write it, but that so young a man had already been engaged in several extradition cases of first-rate importance. At that date the subject had attracted little attention in this country, but thanks to the labours of the Select Committee of 1868, its principles became better understood, and the law regulating their application assumed a permanent form in the admirable Act of 1870. The effects of this change were fully explained by Mr. Clarke in his edition of 1874. His third edition has to record no similar progress, since, from causes not far to seek, the valuable recommendations of the Royal Commission of 1878 have not as yet been embodied in an Act of Parliament; but Treaty-making has been active in the mean time, and a good many cases have been decided by the Courts. The author, with the assistance, as he gratefully acknowledges, of two former pupils, has worked in the results of the recent cases, and sets out textually, in an appendix occupying half the volume, all the extradition treaties to which Great Britain is a party. The least valuable chapter of the work is probably that in which Sir Edward Clarke supports by the authority of a certain number of jurists the proposition that Extradition is obligatory apart from Treaty, while admitting that the duty for which he contends is one rather of 'public morality' than of International law. The current of judicial decisions and of modern diplomatic controversies is on such a subject of more value than many citations from Grotius or Burlamaqui. The theory and the history of extradition have been discussed within the last ten years on the Continent with vast erudition, and with a minuteness of detail of which some idea may be gained by a glance at the list of authorities cited in the treatise of Dr. Lammasch, which we had occasion to notice a year ago¹. In such enquiries Sir Edward Clarke's book will naturally carry us but a short way. Its merits are of a different order, and such as might be expected from a singularly clear-sighted observer of a system with the working of which he has been much and closely concerned. Chapters VII and VIII are especially useful and interesting. The former contains a succinct account of the practice in extradition of France, England, the United States, and the Dominion of Canada. In the latter, the Solicitor-General sums up the conclusions at which he has arrived with reference to the present state of English law upon the subject. He disapproves of several of the provisions of the Act of 1873, and severely criticises the two recent cases of *R. v. Ganz* and *R. v. Nillins*. The last mentioned case was certainly somewhat startling. Nillins, while resident in Southampton, sent by post certain forged bills of exchange to persons in Germany, and was surrendered to Germany for this offence.

The work remains, as it was on its first appearance, the only text-book upon the law of extradition as practised by Great Britain, and it is not likely soon to be superseded.

T. E. H.

¹ L. Q. R., III. p. 229.

Inebriety, its etiology, pathology, treatment and jurisprudence. By NORMAN KERR, M.D. London: H. K. Lewis. 1888. 8vo. xxx and 415 pp.

THIS treatise is able, learned, and in the main moderate. Dr. Kerr's argument, in so far as it bears upon the medico-legal branch of his subject, may be summarised thus. Inebriety is a constitutional disease of the nervous system, characterised by a very strong morbid impulse to, or crave for, intoxication. Occasional, or even repeated, cases of drunkenness are only evidentiary symptoms of inebriety; they do not constitute it. Nor does this disease essentially depend upon the particular intoxicant to which an inebriate is addicted. That may be absinthe, cocaine, opium, alcohol, or any one of a hundred other stimulants. Dr. Kerr next shows that there is a close analogy, if not an actual historical relationship, between inebriety and insanity, and that the former disease, like the latter, may be roused into fatal activity by a single act of indulgence, or by circumstances over which the patient may or may not have control. It becomes necessary, therefore, to determine the effect of inebriety—upon civil capacity and criminal responsibility. And now our author reaches the point at which the lawyer and the doctor have hitherto parted company not without dust and heat. But Dr. Kerr, while he is too thorough an alienist not to give an occasional overcolouring to his facts, is at the same time too much of a logician to draw extreme conclusions. And his apparent contentions, which it may suffice to state without detailed criticism, are these:—

1. That no *uncured* inebriate should be permitted to marry.
2. That law should recognise inebriety itself as a disease which may modify and in some cases cancel criminal responsibility.
3. That the allowance of the plea of inebriety in any given instance should be determined by a medico-legal tribunal—an aspiration which might perhaps be realised by extending to criminal cases the power of summoning assessors which the judges possess under the Judicature Acts in civil proceedings.
4. That the Habitual Drunkards Act, 1879, should be replaced by a permanent measure providing, after the American and Colonial models, for the maintenance of pauper or poor inebriates at the public charge, and for the magisterial committal of habitual drunkards to licensed retreats.

A. W. R.

A Concise Treatise on the Law of Covenants. By G. BALDWIN HAMILTON. London: Stevens & Sons. 1888. 8vo. xxiv and 165 pp.

WE took this book in hand with some misgivings, as the author was called only in 1886, but we were agreeably disappointed, and we think that it will be found useful. The book contains some original research, but it is of very unequal merit. Perhaps the best parts are the first chapter 'What is a covenant and how created,' and the discussion at pp. 102 et seq. of the difficult questions relating to covenants running with land in cases where they are not annexed to a reversion, which is decidedly good. The appendix contains an interesting account of the old action of covenant.

The author is able to write good English when he likes; we therefore have a right to complain that in many cases he does not take the trouble to do so. *Ex. gr.* on p. 42, 'In an assignment of a lease as beneficial owner,' 'In mortgages the same covenants are implied,' there being no antecedent to which the word 'same' applies. This carelessness of diction is very apparent in the discussion of joint and several covenants, where in places it almost amounts to an inaccurate statement of the law.

It is very difficult to write on law without making mistakes; a somewhat painful experience has taught us that the best manner of avoiding them is to have both the MSS. and the proofs read by a competent critic, and to alter every passage to which he objects, however unreasonable his objection may appear. But even if this is done some blunders will remain, blunders of which one is horribly ashamed. If it was not an ungracious task one could write an amusing article consisting of the astounding blunders committed by eminent legal writers. We hope therefore that Mr. Hamilton will take our criticisms in good part; his book is full of promise, and we venture to predict that if he will bestow more of the labour of the file on his next book it will be successful.

H. W. E.

A Treatise on the Law of Partnership. Fifth Edition. By LORD JUSTICE LINDLEY, assisted by WILLIAM C. GULL and WALTER B. LINDLEY. London: W. Maxwell & Son. 1888. La. 8vo. 1x and 844 pp.

THE fifth edition of 'Lindley on Partnership' has taken a new departure. With a view to convenience and expense, the familiar treatise has been divided into two parts, each complete without the other. The first volume is now in our hands, containing the law of partnership proper, and the second, which is promised shortly, will deal with the law of companies so far as it has any connexion with the law of partnership. To our mind this division of subjects is a distinct improvement. It saves the practitioner from the petty annoyance of taking down the volume containing an index, only to find that the point which he seeks is discussed in the other volume. Now he will know at once which volume it is that he needs, the partnership volume or the company volume. Besides the immense development of company law, which will in its relation to partnership be discussed in the forthcoming volume, there have been several important decisions, though no legislative change, in the ten years which have elapsed since the publication of the fourth edition of this work. There have been notably the cases of *Kendall v. Hamilton*, *Scarf v. Jardine*, and *The Yorkshire Banking Company v. Beatson*. The second of these, which is well known for its important bearing on the liability of a retiring partner for the debts of the firm, is referred to no less than eleven times in the volume before us, and twice with particularity of the circumstances. It is an ingenious device and, so far as we are aware, one peculiar to the writer, to give in the list of authorities cited an asterisk to the page on which a case is considered in detail, and not merely quoted in a note. The author and his assistants expressly disclaim any attempt to cope with the authorities since 1866 extraneous to the Law Reports. Those authorities are the bugbear of the busy lawyer. It is by no means easy for him to assure himself that the point upon which he is engaged has not been directly decided in one of the three or four contemporary and equally authoritative reports, and generally he runs the risk of being confronted with such an authority by his opponent. So that it is a great assistance to him to have these foreign cases collected and analysed for him by a text writer such as the Lord Justice. We are disposed, while we are on small things, to complain of the number of additions and corrections, which is for a fifth edition abnormal, and takes a full forty minutes to incorporate in the text. In other small things the industry of Lord Justice Lindley's assistants is not at fault. For the corpus of the work, that has been well tried in the furnace of daily practice, and it has stood the severest test. It is the monograph on the subject which lives in legal libraries as an indispensable assistant. It has lived long, and this latest edition is in no respect unworthy of its predecessors. Even now however there are occasionally

to be found sentences which would bear elucidation, such for instance as that on p. 21: 'A contract of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time.' Is the ordinary contract by which two men engage to be partners so long as they both live a contract for a specified time? The answer to this question should be, we believe, in the affirmative, but it is an answer which it is hard to find in the pages before us. Taken however as a whole, the latest edition of 'Lindley on Partnership' deserves the same measure of praise and success as the unanimous judgment of the legal community has respectfully awarded to its predecessors.

Chitty's Index to all the Reported Cases decided in the several Courts of Equity in England, etc. The Fourth Edition. By HENRY EDWARD HIRST. Volume VI, containing the titles 'Packer' to 'Smuggling.' London: Stevens & Sons; H. Sweet & Sons; W. Maxwell & Son. 1888. La. 8vo. x and 5373-6369 pp.

YET another volume of Chitty's invaluable Equity Index has reached our hands, and it shows no falling off from its five predecessors as concerns the laborious accuracy which Mr. Hirst has bestowed upon it. The sixth volume contains such important titles as Partition, Partnership, Patent, Perpetuity, Petition of Right, Portion, Power, Principal and Agent, Railway, Registration, Revenue, Scotland, Set-off, Settled Estates Acts, Settlement, the Rule in Shelley's Case, and Shipping. By a curious coincidence the first title in the volume is 'Packer' and the last 'Smuggling,' just as the first title in one volume of 'Fisher's Digest' is 'Crops' and the last 'Hunting.' The succession of these volumes is fairly rapid. We noticed in our January number the fifth volume, and now in July we are enabled to notice the sixth. May next January see the invaluable seventh and last in our hands, for its index of cases will enable us to turn to any decision *nominatim*, instead of hunting for it, as at present, under its subject which may be dubious. But even on the assumption that by January 1889 birth be given to the final volume of Chitty, five years and a half will then have elapsed from the day when the first volume of the series saw the light. True it is that progress has been more rapid since Mr. Hirst has undertaken his task singlehanded, but there is no denying that there will be a formidable gap to be filled up between the end of 1883—the point up to which the Equity Index, save only the first two volumes, *εἵματα εἶναι* complete and unimpeachable—and 1889, the year which will, we anticipate, see its last volume published. This gap means that there are so many volumes of law reports of every race, or so many annual digests, to be scanned by the practitioner before he can be assured that he has surveyed his point under consideration from one pole to the other. And the unpleasant fact must not be lost sight of, that by publishing the first volume before the year 1883 had expired, Mr. Hirst has exposed his editions to the charge of inconsistency, in that one volume contains cases up to a date different from that attained by the others. Nothing, however, is more transitory in its nature than a legal digest or text-book, and the time is very short during which a lawyer can look upon it as 'absolute in every number.' We can but hope that at least for the sake of the community whose hive is Lincoln's Inn, Mr. Hirst may undertake the task of editing the fifth edition of 'Chitty,' when in the fulness of time that edition is demanded.

Histoire du Droit et des Institutions de la France. Par E. GLASSON.
Tome II. Paris: F. Pichon. 1888.

IN the first volume M. Glasson dealt with Celtic and Roman Gaul (see *LAW QUARTERLY REVIEW*, vol. iv. p. 100). The second volume is devoted (as will be the third) to the Franks. The present volume treats of their political and administrative organisation and of the condition of persons among them at a period when the differentiation of the peoples which were to spring from the common German stock had yet made little progress. We find here the beginnings of some of our own institutions, and even of some of our legal expressions, as in the case of *trustis*, though used in a very different sense (p. 600). (See also 'mansiou,' p. 361.) The volume is preceded by an exhaustive methodical bibliography (33 pages) of literature relating to the period.

The Law and Practice on Enfranchisements and Commutations. By ARCHIBALD BROWN. London: Butterworths. 1888. 8vo. xx and 456 pp.

THE Copyhold Acts 1841-1887 form a series of seven Acts, creating a sufficient muddle to justify the epitome contained in this book. The epitome is divided into chapters treating separately of enfranchisements and commutations,—an arrangement which involves some lengthy repetitions. To these are prefaced a chapter on enfranchisements and commutations at common law; and the body of the work (consisting of 144 pages) concludes with a chapter of practical directions. There are the inevitable appendices, setting forth the seven Acts already mentioned, nine other Acts incidentally connected with the subject-matter, and a collection of precedents and official forms. The Act of 1887 is accompanied by some apt annotations. There is a full and well-arranged index; and the whole will be a useful handbook for stewards of manors and others who have much to do with these incidents of copyhold tenure.

The Justices' Note-book. By the late W. KNOX WIGRAM, J.P. Fifth Edition, by WALTER S. SHIRLEY, M.P. London: Stevens & Sons. 1888. 8vo. xii and 527 pp.

THE appearance in a fifth edition of (we note with regret) the late Mr. Wigram's excellent Note-book for Justices deserves mention here, although the work in an earlier edition has been reviewed in the *LAW QUARTERLY*¹. The text of the work is substantially unaltered; but recent decisions and legislation have been worked in. The arrangements, however, for dealing with the legislation of 1887 are not satisfactory. A number of extracts of these Acts are placed in an appendix, without being in any way worked into the text. The lateness of the last year's session may have made it difficult properly to incorporate this matter in a book published in December; but the difficulty ought to have been foreseen and remedied, at the cost (if necessary) of reprinting.

We may here repeat the opinion formerly expressed of the literary merits of Mr. Wigram's book. The style is clear, and the expression always forcible, and sometimes humorous. The book will repay perusal by many, besides those who, as justices, will find it an indispensable companion.

A Handbook of Written and Oral Pleading in the Sheriff Court (Scotland). By J. M. LEES, Sheriff Substitute of Lanarkshire. Glasgow: William Hodges & Co. 1888. 8vo. xxii and 232 pp.

Few judges have a more varied experience than a Sheriff Substitute—who

¹ July, 1885.

is in fact the acting Sheriff—in Lanarkshire. Besides having important functions, both administrative and judicial, in criminal matters, he is judge ordinary in a populous and actively commercial district, with a jurisdiction, in personal actions, unlimited in amount. From this point of view the author gives hints and directions to the practitioners in his own and similar courts, which, if well digested and attended to, will avoid the risk of miscarriage in a well-founded claim; and prevent many an ill-advised proceeding from being entered on. The directions are thoroughly practical and sound, and well adapted for the use of the class for whom they are written. The language is popular, and sufficiently free from technicalities to make the book interesting to the wider class of those who may wish to know how a system of subordinate local judicature, so successful as that existing in Scotland, is actually conducted.

Redress by Arbitration. A Digest of the Law relating to Arbitration and Awards. By H. FOULKS LYNCH. London: Effingham, Wilson & Co. 1888. vi and 86 pp.

THIS is an attempt to treat a subject popularly and scientifically. The combination is not one which is either desirable or satisfactory. A popular legal hand-book should be written in a purely popular manner. The scientific method when used popularly is apt to become ridiculous. For example, Article 3 begins thus: 'One arbitrator is better than two, because one is more likely to act judicially.' It is absurd to put a piece of information based on the experience of men of business into the form of a proposition of pure law. While therefore the layman will be able to pick up some information about arbitration in this book, Mr. Lynch would have saved himself trouble and have produced a better book if he had sat down and simply written out in ordinary form some hints about arbitration.

A Selection of Leading Cases in the Criminal Law. By WALTER SHIRLEY SHIRLEY. London: Stevens & Sons. 1888. 8vo. xii and 147 pp.

THIS little book has a good deal in common with others by the late Mr. Shirley. While it shows no especial degree of learning, and makes no pretence to add to the stock of knowledge common to most barristers practising at sessions, it is reasonably lucid and not particularly inaccurate. Its worst fault is the endeavour to be amusing as well as instructive, which Mr. Shirley was accustomed to achieve by such means as saying 'Mr. Robert' when he had occasion to refer to a policeman, and marginally annotating a case of larceny 'a butcher-boy's little game.' So far as the book goes, it will not do students any great harm. They will not find in it either historical exposition of the law, or critical appreciation of the nice points of dogmatic ~~explanation~~ ^{explanation} involved in such a case as *R. v. Ashwell*.

A Digest of the Law relating to the Sale of Goods. By WALTER C. KER. London: Reeves & Turner. 1888. 8vo. xvi and 137 pp.

THIS Digest is in the form of what has been in late years more usually styled a Code, following, to a certain extent, the method of the Indian Contract Act 1872, but with a variety of arrangement of matter and type that is rather perplexing.

Notwithstanding this defect of form, the book contains some good work; and will be an excellent guide to the salient and most recent authorities on the law of sale of goods; a subject which is continually growing, and developing new materials to be digested. The work done is sound, and

the results made readily accessible for practical use, both by condensation of the subject-matter, and by a good index.

The Complete Annual Digest of every Reported Case in all the Courts for the year 1887. Edited by ALFRED EMDEN, compiled by HERBERT THOMPSON. London: W. Clowes & Sons, Limited. 1888. La. 8vo. lxxxii and 492 cols.

WE are favoured with the last issue of this useful annual. So long as a variety of reports exist, it is a great satisfaction to have periodically an accessible arrangement of their contents which we are assured is exhaustive. The Table of Cases followed, overruled or commented on, Table of Statutes, and Table of Rules, give a ready clue to finding the latest authority, good or bad, upon any subject to which the primary reference, whether of statute or case law, is already known.

We have also received—

Principles of the English Law of Contract, and of Agency in its relation to Contract. By SIR WILLIAM R. ANSON, Bart. Fifth Edition. Oxford: Clarendon Press. 8vo. xxxi and 384 pp.

The Law relating to Actions for Malicious Prosecution. By HERBERT STEPHEN. London: Stevens & Sons. 1888. 8vo. xii and 131 pp.—Mr. Stephen thinks that the law may be said to have at last become what many judges have said or hinted that it ought to be; i.e. that the question of 'reasonable and probable cause' in cases of malicious prosecution and false imprisonment may, since the latest decisions, be frankly treated as a question of fact.

The Law relating to Dogs. By F. LUPTON. London: Stevens & Sons. 1888. 8vo. xii and 160 pp.—This little book will be found useful by country gentlemen and other owners of dogs; it seems to contain a sufficient account of the law of practical utility on the subject.

The Sources of the Law of England. By H. BRUNNER. Translated from the German by W. HASTIE. Edinburgh: T. & T. Clark. 1888. 8vo. x and 63 pp.

The United States and the States under the Constitution. By C. S. PATTERSON. Philadelphia, Pa.: T. & J. W. Johnson & Co. 1888. 8vo. xxxi and 290 pp.

The Madras Code, etc. Second Edition. Calcutta: Govt. Press. 1888. La. 8vo. xxix and 779 pp.

Istituzioni di diritto civile italiano. Per G. P. CHIRONI. Vol. I. Torino: Fratelli Bocca. La. 8vo. xi and 367 pp.

L'unificazione delle leggi Cambiarie nel Congresso Internazionale di diritto Commerciale in Anversa. By SHERIFF DOVE WILSON. Tr. by AVV. SALVATORE SACERDOTE. Turin. 1888. 17 pp.

The Coal Mines Regulation Act, 1887, etc. By MASKELL W. PEACE. London: Reeves & Turner. 1888. 8vo. xiv and 367 pp.

Will-Making made Safe and Easy. By ALMARIC RUMSEY. London: John Hogg. 1888. x and 140 pp.

Accidents de Travail. Par CH. SAINCTELETTE. Brussels: Bruylant-Christophe & Cie. 1888. 26 pp.

The Nature and Value of Jurisprudence, Roman Law and International Law. By CHAN-TOON. London: W. Clowes & Sons, Limited. 1888. 8vo. 31 pp.—A neat little summary showing only traces of the English language not being native to the writer. It looks as if it had been prepared for some special occasion, but there is not anything to show what.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

NOTE ON THE CANONISTS.

FEW English lawyers know what works on the Canon Law are of authority, or the method of citing them. I put together the following notes for my own convenience, and I think that they may be useful to lawyers who are not civilians. I have added a short statement of the method adopted by the Canonists in citing the civil law.

Authorities on the Canon Law.—Various collections of Ecclesiastical law, called ‘canones,’ as distinguished from ‘leges,’ temporal laws, were made from time to time by private persons. The most celebrated of them was the ‘Decretum’ produced by the learned Gratian in the twelfth century, republished in 1582 by the orders of Pope Gregory XIII. In 1226 Pope Honorius III sent a compilation of Decretal Epistles to the university of Bologna, and directed that it should be taught and used both in the courts and schools of law. This compilation appears to have been superseded by an authentic collection called ‘The Decretals,’ published about 1234 under the authority of Pope Gregory IX, who directed that this collection alone was to be used in the courts and in the schools. See Hallam, *Middle Ages*, ii. 287. Another volume of Decretals was published in 1298 by Pope Boniface VIII. Other decretal epistles were published by subsequent Popes under the name of ‘*Extravagantes*.’ A book of Decretals by Mattheus and four books of Institutes by Lancellottus have always been regarded as of great authority in the Canon law, though they have never received the Papal sanction. In England the Ecclesiastical Courts have also received as works of authority the ‘Constitutions’ of the legates Otho (1236) and Othobon (1268), the ‘Glosses’ of Joannes de Atho (about 1290), the ‘Provincial Constitutions’ of successive Archbishops of Canterbury from 1222 to 1417, all of which with the Glosses of Lyndewood (1423) are usually printed together and referred to under the name of Lyndewood. The ‘*Pupilla Oculi*,’ published in 1385 by John de Burgo, Chancellor of the University of Cambridge, is also considered an authority.

Manner of citing the Canonists.—The references to the authorities on Canon and Civil law are very complicated. It is possible that before the invention of printing it was not found safe to adopt the modern plan of referring wherever it is possible to numbers. The first part of the Decretum is referred to as *d. di.* or *dist.* [distinction], the second part as *q.* [quaestio], and the third part as *con.* [consecratio].

References to the first part of the Decretum take the form *dist. 8 quo jure* or *70 dist. c. 1 & 2*, that is, the first part of the Decretum, the chapter beginning ‘*quo jure*’ in the 8th *distinctio*, and the first and second chapters in the 70th *distinctio* of the first book. The second book is referred to as

follows, 26 *q. nec mirum in v.* [or §] *magi*, which means the paragraph that begins *Magi* in the canon *nec mirum* in the fifth *quaestio* of the 26th *causa* of the second part of the Decretum. References to the 3rd *quaestio* of the 33rd *causa* of the second part of the Decretum sometimes take the form *de poena dis. 1. homicidiorum*, which means the canon commencing 'homicidiorum' in that *quaestio*.

The reference to the third part of the Decretum is made as follows, *de Con. dist. I. c. Ecclesia*, meaning the canon commencing *Ecclesia* in the first *distinctio* in the third part of the Decretum.

The Decretals are divided into five books, each book into titles, each title into chapters and paragraphs. The reference *de sum. Trin. et fi. Cat. damnamus* means the chapter *damnamus* in the title *de summa Trinitate et fide Catholica*; this may also be cited as *Extra de sum. Trin. et fi. Cat. c. damnamus*, where 'Extra' means 'Extra decretum Gratiani.' The seventh and eighth books are cited in a similar manner, adding at the end *lib. 6* or *lib. 7*. The Clementine decretals are cited in like manner, prefixing 'Clemen.' or adding 'in Clemen.'

The Extravagantes are cited *de prob. et Dig. Extra. Joan. XXII* or *de major et obed. Extra. Com.*, the references being to the Extravagantes of Pope John XXII or to the Extravagantes Communes.

Manner of citing the Civil law.—The Digests or Pandects are referred to by the letters *ff.* This abbreviation appears to have 'arisen by calligraphic development from a *d* with a line through it' (Roby, Introduction to the Study of Justinian's Digest, p. cclv, *q. v.* for further details). The titles and laws are referred to by their first words: thus *ff. de damno infecto, l. si finita* means the law beginning *si finita* in the title *de damno infecto* of the Digesta. This may also be written *l. si finita, ff. de damno*. The more modern practice is to refer to the numbers of the book, title and law: thus the law cited above would be 'Dig. (or D.) XXXIX. Tit. II. l. 15,' or 'Dig. XXXIX. II. 15.' The Institutions are referred to as follows, *Instit. de nuptiis, § duorum*, which means the paragraph commencing *duorum* in the title commencing *de nuptiis*. This may also be referred to as 'Instit. I. Tit. X. § 4.' Many modern writers use the single letter I, thus: I. i. 10. § 4.

References to the Codex were made as follows: *Cod. de Feriis, l. omnes Judices*, meaning the law commencing 'Omnes judices' in the title *de feriis*. This would now be referred to as 'Cod. (or C.) III. Tit. XII. l. 3.' Some writers, however, still put the law and paragraph before the book and title; and there is much variation in the use of Roman and Arabic figures and other *minutias* (see Roby, l. c.).

References to the Authenticum, i. e. the old Latin version of the Novels of Justinian, are made as follows, *Authent. de nuptiis, cap. sed etiam, coll. 4*, meaning the chapter beginning 'Sed etiam' in the title 'de nuptiis' in the fourth Collatio of the Authenticum. This may be referred to as 'Aut. Col. IV. Tit. I. Nov. VII.'

References to the Liber Feudorum are made as follows, 'In Feud. quid sit Invest. § si vero,' or 'Feud. 2. Tit. 2. § 1.'

The old-fashioned citations without numbers can be traced by means of the indices with which all modern editions of the Corpus Juris are furnished.

H. W. E.

The note in the LAW QUARTERLY for April last (p. 236) upon Mr. Justice Kekewich's disapproval of 'the practice of citing as authorities the text-books of living authors, and particularly of authors on the bench under

the notion that these latter possess a quasi-judicial authority' recalls an incident at the argument of *Rodliff v. Dal'inger* (141 Mass. 1) before the full bench of the Supreme Court of Massachusetts, of which Mr. Justice Holmes is a member.

The question was whether the owner of goods, which had been delivered to an agent for a principal really fictitious, but represented to be existent although undisclosed, and which had been pledged by such agent as his own, could maintain replevin against the agent's bona fide pledgee. After a verdict for the plaintiffs the case came before the full bench upon the defendant's exceptions. These were argued at considerable length by the defendant's counsel, while the plaintiffs' counsel simply read to the Court the third paragraph of Lecture IX of Holmes's *Common Law*, (say) nine lines (see p. 308).

Despite, then, Lord Justice Fry's remark that 'it is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced' (Specific Performance, 2nd ed. preface), it may be said that in this case the opinion of the Court written by Mr. Justice Holmes shows that the counsel for the plaintiff safely assumed that the circumstances under which 'The Common Law' was written and the judgment as to his clients was to be pronounced were far from different, and that 'a quasi-judicial authority' might properly be attributed to the text-book in question, although written before its author's elevation to the bench.

B. S. L.

BOSTON, MASS., 25 May, 1888.

[The relative weight of text-books, as compared with decisions, is no doubt much greater in the U. S. than here.—Ed.]

The Lunacy Acts Amendment Bill appropriately closes an intricate, yet thoroughly characteristic, chapter in the history of English law. After a struggle of nearly a century and a half's duration against the lukewarmness of a public opinion whose fitful activity had to be at once stimulated and sustained by such object-lessons in insanity and its treatment as the sufferings of Norris, the strange hysteria of Chatham, and the incapacity of George III could supply,—against the stern resistance and the material resources of the culprits to whom inquiry meant exposure—and latterly against the conservatism of the House of Lords—the policy of Tuke and of Shaftesbury has prevailed, and a really comprehensive and symmetrical measure has been produced.

The new Bill embodies most of the suggestions made by the Dillwyn Committee.

1. From Scotch procedure (24 & 25 Vict. 54. 14: 29 & 30 Vict. 51. 4) it borrows the principle that the committal of a lunatic to any asylum or licensed house should be a magisterial act.

2. It provides for cases of urgency on the principle of the Scotch 'Emergency Certificate.'

3. It brings every lunatic under confinement into a closer relationship with those who exercise jurisdiction in lunacy—(a) by giving to a lunatic committed under a magisterial order, without a personal examination by the committing magistrate, a general right to insist upon being taken before an independent judge, magistrate, or justice; (b) by requiring medical superintendents to report to the Commissioners of Lunacy upon the bodily and mental condition of every patient within one month after the date of his reception; (c) by making the continuance of the order of detention depend

upon the regularity and the satisfactoriness of subsequent periodical reports; (d) by providing that letters written by patients in any asylum or licensed house to the Lord Chancellor, or any Judge in Lunacy, or to a Secretary of State, a Commissioner or a Visitor in Lunacy, or to a committing magistrate, shall be forwarded unopened, by the medical superintendent or proprietor, under liability to a penalty not exceeding £20 for each offence; and (e) by enabling *any person* to apply to the Commissioners for authority to have a patient medically examined, with a view to his discharge if improperly detained.

4. Power is given to the Court to appoint a committee of the estate only of any person who, upon inquisition, is found capable of managing himself, but incapable of managing his affairs.

5. The new Bill contains a most salutary provision, which has long been demanded, and will be heartily welcomed, by the whole medical profession,—to the effect that any person against whom an action is brought for having improperly granted certificates of lunacy may have it arrested in its preliminary stages and dismissed upon terms, by satisfying a Judge of the High Court that he had acted *bona fide* and with reasonable care.

A. W. R.

Per and Post.—Most students of Elizabethan law must have been perplexed by the constantly recurring phrases 'in the per' and 'in the post,' sometimes for brevity written 'in the per' and 'in the post.' The explanation will, I believe, be found in the forms of the old writs of entry.

If a disseisor (in which word I include an abator, intruder, and the like) made a feoffment, or died seised so that his heir inherited the land, the entry of the feoffee or heir was lawful, as he had a right to the possession, and the form of the writ for the recovery of the land by the rightful owner was for the recovery of land held by A 'in quam non habuit ingressum nisi per B (the original disseisor).' Similarly, if the heir of the feoffee or the feoffee of the heir of the disseisor was in possession the writ took the form 'in quam non habuit ingressum nisi per B cui C (the disseisor), &c.' In other cases where a writ of entry lay, the writ stated that the tenant 'non habuit ingressum nisi post, &c.' The writs were said to be 'in the per,' 'in the per and cui,' and 'in the post.'

It followed that persons claiming under the propositus by feoffment or inheritance were said to be 'in the per,' while those claiming in any other manner, e. g., by the limitation of a use, as tenant in dower, as tenant by the curtesy, as the lord taking by escheat or forfeiture, as a recoveror, as a corporation sole taking on the death of his predecessor, were said to be 'in the post.'

It will be observed that, except in the case of the heir, the distinction is that persons in the per take by the act of the party at common law unassisted by Statute, while persons in the post take by operation of law without any act of the party, or by his act aided by Statute. I ought perhaps to add that I have been unable to find any authority as to the effect of a common law assurance other than a feoffment.

See as to all these points Co. Lit. 237 et seq., 2nd Inst. 153, Lincoln College's Case 3 Rep. 58 b.

H. W. E.

Stonor v. Fowle, 13 App. Cas. 20, is a remarkable example of the way in which eminent judges may go wrong. The House of Lords in this case reverse the decision both of the Queen's Bench Division and of the Court of Appeal, and no careful reader can doubt that the decision of the House of

Lords is right and the judgments of the Courts below wrong. The difference of opinion, it should be noted, arose upon a question not of law but of fact. The inferior Courts held that a County Court judge had made an order for committal in respect of a possible future default in the payment of a debt. The House of Lords held that the order was for commitment in respect of a past default in payment of £20. On the one view of the facts the members of every court before whom the question came considered the order invalid. On the other view, with all but equal unanimity, they considered it valid. If the right to imprison for debt is to be retained it is most desirable that orders for commitment should not be set aside on frivolous or technical grounds. Whether the power to imprison for debt is to be retained depends on the answer to the enquiry whether it is desirable to increase a poor man's opportunity of buying on credit.

No case recorded in this quarter's reports has excited so much attention as the *G. W. Ry. Co. v. Bunch*, 13 App. Cas. 31. Mrs. Bunch's triumph over the company has been celebrated in every newspaper throughout the kingdom. It is useless therefore to recapitulate the facts of the law suit; it is worth while, however, noting one or two points which may escape lay readers. First, the *G. W. Ry. Co. v. Bunch* determines no principle of law whatever: a passenger, whether male or female, who follows Mrs. Bunch's example may, it is likely enough, not achieve Mrs. Bunch's success. Secondly, the sole question for the House of Lords was whether the County Court judge, acting the part of a jury, could under any supposition find a verdict in favour of the plaintiff. Once let this principle be grasped and the decision of the House of Lords follows as an inevitable conclusion from the premises. The only point of view in which the case has any legal importance is the doubt it throws upon the judgment of the Court of Appeal in *Bergheim v. The G. E. Ry. Co.*, 3 C. P. D. 221. The doubt seems to be reasonable, and companies may probably find their liability for loss of luggage placed in a carriage greater than they have hitherto supposed. Thirdly, admirers of Lord Bramwell—and among this class must be placed every lawyer and layman who respects honesty, vigour, common sense, and humour—must regret the extent to which his lordship is unconsciously becoming the advocate of every company. On grounds which in themselves are defensible enough, Lord Bramwell objects to the law of England with regard to the liability of employers, and appears to be incapable of fairly applying a principle of law which he believes to be unfair. Even if companies were always morally in the right his lordship's attitude would from a judicial point of view be unfortunate, but to defend the interests of corporations is not always the same thing as an 'effort for law and justice.' In these days, however, when sentiment is too often allowed to overrule honesty, the public will go on admiring or pardoning a judge whose worst fault is an invincible bias towards what he holds to be the cause of common fairness.

The judgment of the Court of Appeal in *The Bernina*, 12 P. D. 58, is briefly and decisively affirmed in the House of Lords, *nom. Mills v. Armstrong*, 13 App. Ca. 1. No attempt is made in the leading opinion, Lord Herschell's, to exhaust the subject of what is sometimes called 'contributory negligence of a third person;' nor can it be said that this is done by the opinion prepared by Lord Bramwell and relegated to a long footnote, though it is a sufficiently discursive one. And it seems desirable to be content for the present with observing that the supposed authority of *Thorogood v.*

Bryan is now finally cleared out of the way, and the points which remain undecided must be discussed, when the occasion arises, on broader principles.

From a legal point of view *Finlay v. Chirney*, 20 Q. B. Div. 494, is the most interesting decision which has been reported for a long time; it fills up a singular gap in the law as to the survival of actions, and determines that an action for breach of promise of marriage does not survive against the personal representative of the promisor. The oddity of the thing is that though it has long been decided that such an action will not survive to the representatives of the promisee (*Chamberlain v. Williamson*, 2 M. & S. 408), the particular point raised in *Finlay v. Chirney* has not hitherto come definitely before the Courts, or if it has arisen has never been reported. This is one of those instances which excite in the minds of legal theorists some regret that the judges do not deal with the many speculative points which a case often suggests. The judges are not infallible, but they are far more competent both to expand and expound the law than are legislators who are always ignorant and generally prejudiced, or lawyers who being consulted or retained on a particular side, are inevitably biassed even if they be not ignorant. To anyone who reflects on the growth of English law it may appear a plausible theory that the country would gain much by the extension of judicial and the curtailment of Parliamentary legislation. The natural regret that modern judges do not more frequently give full expositions of the law will be certainly increased by a study of Lord Esher's and Lord Justice Bowen's judgments in *Finlay v. Chirney*; they are different in style, the one deals with the practical, the other with the historical side of the question before the Court. Lord Justice Bowen's judgment is as admirable a criticism of the history and meaning as regards English law of the maxim '*actio personalis moritur cum persona*' as can be found in any judicial utterance or book. Every line in it is suggestive of thought and reflection.

Cooper v. Cooper, 13 App. Cas. 88, is a Scotch case, but deals with two matters which are of wider interest than enquiries depending for an answer on peculiarities of the law of Scotland. The House of Lords decide in the first place, that it is competent for the House when sitting as a Scotch Court of Appeal, to take judicial notice of English and of Irish law. This doctrine conforms to precedents and to common sense, yet as a matter both of theory and occasionally of practice it may give rise occasionally to curious difficulties. Their lordships, when hearing Scotch appeals, are as much a Scotch Court as is the Court of Session, and logically it is not easy to see why it is more competent for the House of Lords than for the Court of Session to take judicial notice of English or Irish law. The common sense answer, no doubt, is that their lordships are the most eminent English lawyers, and that it were ridiculous for them to ignore their own knowledge and seek information from inferior authorities. This reply, like most of the solutions supplied by common sense, does not reach the bottom of the difficulty. When their lordships sit as a Court of Appeal for England they will, we presume, take judicial notice of Scotch law, but it were mere flattery to suppose that the majority of their lordships can on a question of mere Scotch law compare as experts with the judges of the Court of Session. Meanwhile, historians, if they ever thought it worth while to study law as a portion of history, would do well to note how much the position of the House of Lords as a final Court of Appeal has done to consolidate the union betwixt Scotland and England.

Cooper v. Cooper, in the second place, decides that where a woman before marriage enters into a marriage contract in the country where she is domiciled, her capacity to enter into such ante-nuptial contract must be determined as regards its effects after her marriage by the law of the country, in the particular case Ireland, where the woman is domiciled before marriage, and where the contract is made. The decision, as far as it goes, is, it is submitted, clearly right. The capacity to make an ante-nuptial contract must depend on the capacity of the contractor at the time when the contract is made, and this in its turn must depend either upon the law of the contractor's domicile or upon the law of the country where the contract is made. It clearly cannot depend upon the law of the country where the woman becomes domiciled on her marriage, for the capacity to make the contract must exist, if at all, at the moment when the contract is made. Unfortunately from a theoretical point of view the judgment of the House of Lords in *Cooper v. Cooper* just glances at, but owing to the facts of the case does not decide the one question of speculative difficulty, namely, whether the capacity to contract depends on the law of the contractor's domicile or on the law of the country where the contract is made. The two laws in the particular instance coincided, and every student of law must regret that the marriage contract was executed in Dublin and not in Scotland.

Howard v. Clarke, 20 Q. B. Div. 558, curiously illustrates a feature of English procedure which has been constantly overlooked by the eulogists of trial by jury. This neglected fact is the inroad made by the Court on the province which in theory belongs exclusively to the jury. The division of function is known to all the world; the judge decides every matter of law, the jury decide every matter of fact. Now suppose a foreigner well imbued with this elementary maxim had attended the argument in *Howard v. Clarke*, consider what he would have found. He would soon have discovered that two questions called for decision. The first was whether in spite of the verdict that *X* had arrested *A* without 'reasonably suspecting' *A* to be a thief there was *any evidence* on which the verdict could be rightly found, and that this enquiry would be answered by the Court. This would a good deal stagger our foreigner, say a French lawyer; for he would argue that the question whether there exists any evidence of a circumstance, say the state of a man's belief, is as truly a question of fact as is the enquiry what weight is due to evidence which admittedly exists.

The second question for decision was whether the existence of 'reasonable suspicion' on *A*'s part was a matter for the determination of the judge or for the determination of the jury. Our French critic would be surprised that the question could arise; he would be astounded that it should be decided in favour of the judge; states of mind are, he would argue, facts; and a question whether *X* felt reasonable suspicion of *A* is neither more nor less a question of fact than the question whether *X* intended to cheat *A*. Our French critic would be right in logic; if it be true that questions of fact are always left to the jury, it certainly follows that the existence of reasonable suspicion on the part of *X* is a question for the jury. The conclusion of the argument is false because one of its premises is untrue. It is not true that the jury determine all questions of fact. Judicial innovation has greatly to the benefit of the nation cut down the authority of the jury, and thus preserved trial by judge and jury from destruction.

The increasing wants of the Exchequer, or the increased energy of the Commissioners of Inland Revenue, cause constant additions to cases affecting

the liabilities of tax-payers. *Stevens v. Bishop*, 20 Q. B. Div. 442, *Hesketh v. Bray*, *ibid.* 589, both refer to the mode in which the annual value of real property is to be computed under the Income Tax Acts. The first decides that in estimating the annual value of tithe commutation rent-charge for the purpose of charging the owner thereof he has a right to deduct the amount necessarily expended in the collection of the rent-charge. The matter is in itself of no great importance, but the decision may possibly suggest to landowners, whose rent is got in with difficulty, claims to exemption which neither the Courts nor the Legislature may be prepared to sanction. The second of the cases cited certainly shows that a proprietor of landed property may try to strain the exemptions provided by the Income Tax Acts far beyond the intention of Parliament. It was a bold contention that money expended in reclaiming land from the sea and thus adding to its value is money expended in making or repairing an embankment 'necessary for the preservation or protection of land,' and therefore was to be deducted from the amount assessable to duty under 16 & 17 Vict. c. 34, Schedule A, s. 37. The Court easily grasped a distinction undiscernible to the party interested.

The Queen v. Commissioners for Special Purposes of Income Tax, 20 Q. B. Div. 549, as reported in the Law Reports, determines a point depending wholly upon the construction of 5 & 6 Vict. c. 35, s. 133, and can hardly be said to raise any question of general interest. As argued, however, the case raised the question whether a mandamus lies of which the aim is in effect to compel the servants of the Crown to repay money received as part of the revenue. Two judges, Justice Field and Justice Grantham, were of opinion that it lies. The soundness of this view is, considering the judgment of the Court of Appeal *In re Nathan*, 12 Q. B. Div. 461, open to the gravest doubt. In any case, readers of the Law Reports have a right to complain that all reference to a point of legal interest fully discussed in a reported case should have been omitted in the report.

In re the Institution of Civil Engineers, 20 Q. B. Div. 621, determines that the Institution of Civil Engineers is a body 'for the promotion of education, literature, science, and the fine arts,' and as such entitled to claim that the annual value or income of property belonging to the body shall be exempted from taxation under 48 & 49 Vict. c. 51, s. 11, sub-s. 3. The decision of the Court of Appeal in this case reverses the judgment of the Queen's Bench Division. The Court of Appeal, moreover, are not unanimous. The result therefore is that the opinion of three judges is overruled by that of two. Laymen will take this as showing the absurd uncertainty of the law. It shows, however, nothing of the kind. No skill in draftsmanship can do away with the difficulty of applying principles to facts. Whether a society such as that of the Civil Engineers is a body 'for the promotion of education, literature, science, or the fine arts,' is one of those enquiries on which the opinion of equally competent men will always be divided. The true moral of such decisions is twofold: first, that the expediency of having more than one Court of Appeal is doubtful; secondly, that Parliament would act wisely in not increasing exemptions to the general rules which determine liability to taxation.

McGregor v. McGregor, 20 Q. B. Div. 529, determines that a husband and wife may contract, without the intervention of a trustee, to live apart in consideration of their agreeing not to take legal proceedings against one another, and that though the agreement be a verbal one, the wife may recover under it from her husband arrears of maintenance which have come

due under the agreement, and that this right does not in any way depend upon the Married Women's Property Act, 1882. This decision need not be quarrelled with on the grounds of common sense or of justice; but it illustrates two points worth notice. The first is one to which we have incessantly called attention, namely, the urgent necessity there exists for placing the position of married women on a clear and intelligible basis. The only way in which this can be achieved is to abolish the distinction both as to rights and liabilities between the position of married, and the position of unmarried women. A County Court judge need not be a great lawyer, but he must of necessity know more law than ninety-nine out of every hundred laymen; and the County Court judge who first decided *McGregor v. McGregor* held that the Married Women's Property Act, 1882, determined a question with which it had no real concern. It is, in the second place, open to great doubt whether cases such as *Knowlman v. Bluett*, L. R. 9 Ex. 307, which are followed in *McGregor v. McGregor*, and which cut down the natural meaning of the fourth section of the Statute of Frauds, have not done more harm by confusing the law than they have done good by preventing hardship in individual cases. All the judicial attempts to curtail the effect of the fourth and seventeenth sections are arguments for the total repeal of these celebrated enactments. If they were removed from the Statute-book, the law of contract would be relieved from an infinity of complications.

Wennhak v. Morgan, 20 Q. B. Div. 635, decides a matter of considerable interest to the ordinary public, namely that the disclosure of a libel by a man to his wife, and we presume by a wife to her husband, is not such publication as gives ground for an action. The decision itself is clearly right, and nothing but the authority of the House of Lords would convince us that a rule obviously in conformity with common sense was not also sanctioned by common law. The reasons given for the judgment of the Court are less satisfactory than the decision itself. The fiction that husband and wife are one is a rickety foundation on which to base a doctrine not requiring fictitious support. It were far better again to lay down that communications between husband and wife are absolutely privileged than to lay down, as the Court appear to do, that disclosure of a libel is not in a particular case publication. Clearness of language promotes clearness of thought. *A* does publish a libel about *N* when he makes the libel known to *B*, but if *B* is *A*'s wife *A* has a right to make a libel against *N* known to *B*. This is the true state of the case; the more plain the language in which it is put the better. It is false to say that *A* and *B* are one person; it involves confusion to assert that the very same act which is 'publication' in the case of *C* is not publication in the case of *B*.

No part of the law ought to be clearer than the rules regulating the time within which actions can be brought for the recovery of ordinary debts. *In re Hollingshead*, 37 Ch. D. 651, proves that the enquiry when a debt becomes barred by time is, as the law now stands, by no means a simple one. A widow and devisee for life pays interest on a simple contract debt of her testator. To decide whether such payment is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder, three or four statutes have to be consulted, and it after all turns out that the point in dispute is in reality a new one. With Justice Chitty's decision that such payment of interest keeps the debt alive, we have no quarrel whatever; it is well that simple contract debts should be placed in the

same position in so far as the law allows, as specially debts; as to which see *Roddam v. Morley*, 1 De G. & J. 1. But every reasonable man has reason to complain that the legislature and the judges between them have introduced subtleties and complications into a branch of the law which should be as simple as the multiplication tables.

Bidder v. Bridges, 37 Ch. Div. 406, belongs to a class of decisions on which any one who studies the law in a scientific spirit must always look with suspicion. It is one of those cases in which the judges have attempted, and perhaps with success, to distinguish cases which seem in substance identical for the sake of cutting down or, if an expressive vulgarism may be allowed, 'whittling away' the effect of a rule of law too well established to be overridden, and it is thought too unreasonable to be fairly carried out. The doctrine maintained in *Pinnel's case*, 5 Rep. 117 a, and in *Cumber v. Wane*, 1 Strange 426, has, every ordinary person would suppose, been deliberately affirmed to be good law in *Foakes v. Beer*, 9 App. Cas. 605. The doctrine itself that the payment by a debtor of part of a debt actually due cannot be a good consideration for a contract not to take proceedings for the recovery of the residue may or may not be reasonable. It is however intelligible, and if it be held unreasonable should be set aside by the legislature. But the unreasonableness of the rule goes very little way to determine the reasonableness of the Court in refusing to follow it out to its logical consequences. The plain truth is that the method by which the Court of Appeal has diminished the effect of *Foakes v. Beer* may promote justice in a particular instance, but strikes at the foundation of that legal certainty which is the only security for legal justice.

Urquhart v. Butterfield, 37 Ch. Div. 357, must in its result have grievously disappointed the plaintiff, or rather the legatees whom he represented, and it also must bitterly disappoint every lawyer interested in legal theory. The legatees must have been disappointed, because after attaining a decision in their favour on questions of considerable intricacy and nicety, they lost a large legacy because they could not make out that their testator was domiciled in Scotland. Theorists must feel deep disappointment because the case nearly raises but does not decide one of the most curious problems connected with the conflict of laws, a problem which has been constantly debated by jurists, and has never been solved by any English Court. D's minority is according to the law of his domicile of origin attained at the age of twenty-one; according to the law of the country where he is residing it is attained at fourteen. Is it at fourteen or at the age of twenty-one that he acquires the capacity for acquiring a domicile of choice in the country where he resides? This is the question that would have been raised if the Court had held in *Urquhart v. Butterfield* that the testator, Mr. Hoyes, intended to acquire a domicile in Scotland. Unfortunately the Court held, and with good reason, that under no view of the circumstances was he ever domiciled in Scotland. Their decision may put off for a century or more the solution of an enigma which has long harassed everyone occupied in studying the conflict of laws.

A contract made by telegraph is completed at the place whence the telegram accepting an order is despatched. This is the main point decided in *Cowan v. O'Connor*, 20 Q. B. D. 640. The decision places contracts by telegraph in the same position as contracts made by letter sent through the post.

The Court of Appeal was clearly right in reversing Mr. Justice Stirling's judgment in *Peck v. Derry* (37 Ch. Div. 54). Apart from collateral points which seem to have complicated matters in the Court below the case was a simple one. The directors of a tramway company stated in the prospectus as 'one great feature of this undertaking' that they had the right to use steam power: in fact, at the date of the prospectus they had not the right and knew they had not, but *they expected to get it*. Whether they had reasonable grounds for such expectation or not was a quite irrelevant issue. On a matter of opinion such as that in *Western Bank of Scotland v. Addie* (L. R. 1 Sc. App. 145), where the bank's shares were stated to be 'a good investment,' it might be relevant, but not on a matter of fact: yet a great deal of time was wasted in following this false scent.

It will be observed that the Court of Appeal has carried the definition of deceit one step farther. Hitherto it has been doubtful whether the absence of reasonable ground for believing in the truth of one's assertion is a substantive ground of liability, on the principle that *culpa lata dolo aequiparatur*, or is material only as evidence that one did not believe it. Every member of the Court declared himself in favour of the former view, which, whether or not the older authorities really come up to it, is both the more scientific and the more wholesome one.

There is good sense in Sir James Hannen's defence of the phrase 'legal fraud' as expressing 'that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility,' thus distinguishing mere recklessness from the darker kind of deliberate fraud. 'Legal' or 'constructive' fraud means and ought to mean something which is not fraud but to which the policy of the law has attached the same consequences; just as in 'constructive delivery' there is a change of possession without actual delivery, or, when goods are in the possession of a bailee, but the bailor also may sue in trespass in respect of them, the bailor is said to have 'constructive possession,' i.e. he does not really possess but he is allowed to have the same remedy as the possessor.

After *Re Almada & Tirito Co.*, Allen's case (36 W. R. 593) following *Re Addlestone Linoleum Co.* (37 Ch. Div. 191: 36 W. R. 227) it must now be taken as settled, so far at least as the Court of Appeal is concerned, that the issue of shares at a discount is *ultra vires* as in effect a return of capital. What then is the position of a *bona fide* transferee of such shares without notice? If the certificates represent the shares to be fully paid up he clearly comes within the doctrine of *Burkinshaw v. Nicolls* (3 App. Cas. 1004) illustrated by the recent case of *Re A. W. Hall & Co.* (37 Ch. D. 712), and company and liquidator are alike estopped from treating the shares as other than paid up, but if there is no such representation it would seem that the transferee buys the shares subject to their legal incidents, and one of these is the payment of the full amount in cash. If this is hard, it is not so hard as the case of the transferee who has paid for shares and is refused registration by the directors (*London Founders Association v. Clarke*, 20 Q. B. Div. 576). In view of the amendment of company law Lindley L.J.'s observations in *Re Wheal Buller Consols, Ex parte Jobling* (57 L. J. Ch. 333) as to the unsatisfactory state of the law as to directors' qualification may, it is to be hoped, engage the attention of the legislature. A statutory share qualification for directors involving a substantial stake in the company would probably do more to secure *bona fides* in the formation and management of a company than the abolition of £1 shares or government inspection

suggested by Lord Bramwell, or even than the careful precautions against fraudulent prospectuses in Mr. Maclean's company Bill.

It is not only a fair presumption that a father living on affectionate terms with his daughter may be trusted to do his best for her in arranging the terms of her marriage settlement (*Tucker v. Bennett*, 38 Ch. Div. 1), but in this case there was ample evidence that she, being of full age and at least ordinary sense, did so trust him. The decision of the Court of Appeal seems quite correct in point of law. Sir James Hannen dissented on the effect of the evidence, treating the question as really one of fact; but as regards the authority and instructiveness of the decision, the facts can only be taken as found by the majority.

Laws, says Hobbes, are like hedges set not to stop travellers, but to keep them in the way. This is more than can be said for that 'mighty maze without a plan,' the Bills of Sale Acts, of which *Re Yates, Batcheldor v. Yates* (38 Ch. Div. 112) furnishes the latest illustration. *Re Burdett, Ex parte Byrne* (20 Q. B. Div. 310) and *Monetary Advance Co. v. Cater* (20 Q. B. D. 785) come as some encouragement to the harassed bill of sale-holder. Besides these, two decisions stand side by side in the current number of the Q. B. D. apparently (perhaps not really) in conflict as to the effect of misdescription of the grantor's Christian name, *Lee v. Turner* (20 Q. B. D. 773) and *Downs v. Salmon* (20 Q. B. D. 775). With such a dubious security as a bill of sale, who can wonder that money-lenders are converted into usurers?

Are advertisements for evidence a contempt? In *Pool v. Sacheverel* (1 Peere Wms. 675), a case of advertising for evidence to disprove a Fleet marriage, Lord Macclesfield in a considered judgment said, 'It is a reproach to the justice of the nation and an insufferable thing to make a public offer in print to procure evidence, and is tantamount to saying that such persons as will come in and swear, or procure others to swear, such a thing shall have £100 reward, and this in a cause now depending here.' In *Plating Co. v. Farquharson* (17 Ch. D. 49) the Court of Appeal questioned *Pool v. Sacheverel*, and Jessel M.R. observed that advertisements for evidence, to prove what the advertiser believes to be true, are no subornation of perjury, making the question rather one of *bona fides* than of public policy, a criterion disclaimed by Lord Macclesfield, for he expressly states in *Pool v. Sacheverel* that the advertiser was innocent, and puts it upon the justice of the nation being concerned. The advertisement, as the Chancellor observes, 'will come to all persons, rogues as well as honest men.' To succeed, it has only to be made tempting enough, if Charles II's favourite maxim is true, and every man has his price. In *Brodribb v. Brodribb & Wall* (11 P. D. 66), an indignant co-respondent offered a 'reward of one hundred guineas for such information as will lead to the discovery and conviction of the instigators of such charges,' a clear contempt as tending to deter witnesses. In the latest case on the subject, *Butler v. Butler* (13 P. D. 73), the respondent to a divorce suit had placarded about the village where his wife was living advertisements for evidence calculated to discredit her in the eyes of the public. Butt J. committed him for contempt on the ground that the advertisements were *mala fide*, but expressed an opinion that a *bona fide* attempt to procure evidence in a suit, even by an advertisement offering a reward, was not a contempt. Certainly the practice of the Government in offering rewards in criminal cases may be cited in its favour, and if this is lawfully done, it can

hardly be a contempt for a party charged with a crime to advertise for evidence to prove his innocence. Probably no general rule can be laid down, but each case must depend on its particular circumstances.

In *Pescod v. Pescod* (58 L. T. R. 76) two arbitrators had to appoint an umpire. Each named an umpire who was unknown to the other, wrote the name of his nominee on a slip of paper at an hotel, put them in a hat, and got the waiter to draw. Kay J. held this chance mode of selection void on the ground that the umpire so chosen was not known to one at least of the arbitrators to be a fit and proper person. The distinction between this case and *Neale v. Ledger* (16 East 51) was that in the latter case each arbitrator nominated an umpire whom the other thought fit, and they then settled it by tossing. The Court upheld the appointment, Lord Ellenborough observing that the mode of appointing twelve jurors out of all those who are returned as fit to serve is by lot.

'Equity,' says Selden, 'is a roguish thing,' but equity will not go so far in the way of roguery as to dispose of its wards' property without their consent either under the Infants Settlement Act or under any autocratic power inherent in itself (*Seaton v. Seaton*, 13 App. Cas. 61). This case illustrates how very elementary a point of law may reach our highest Court of Appeal. It also illustrates by the way the inconvenience of the names of cases being not only transposed but transformed in their passage to the House of Lords. Thus in the current number of the Appeal Cases, *Buckmaster v. Buckmaster*, *The Bernina*, *Reg. v. Judge of Brompton County Court*, have become respectively *Seaton v. Seaton*, *Mills v. Armstrong*, *Stonor v. Fowle*.

Where a will is executed in duplicate and the testator retains one while he deposits the other in the custody of another person, the destruction of the duplicate in the testator's possession revokes the whole. This is a well-established proposition. A will or codicil in the testator's possession and not forthcoming at his death will, in the absence of evidence to the contrary, be presumed to have been revoked. This also is a well-established proposition. *Jones v. Harding* (58 L. T. R. 60) combines these two propositions, deciding that where a will is executed in duplicate and at the testator's death his duplicate is not forthcoming, a presumption arises that the duplicate has been destroyed *animo revocandi*. The inclination of Mr. Justice Butt's mind was against such a presumption, but he followed an unreported case, *Lucamore v. Chambers*, vouched by counsel. Presumptions which may cause the fact to be found against the truth are to be invoked with extreme caution.

A reformatory boy insisting on his right to go to church (*Taylor v. Timson*, 20 Q. B. D. 671) might puzzle the intelligent foreigner, and his surprise would not be lessened if he were told that all Englishmen and Englishwomen (not being dissenters protected by the Toleration Act) are still bound to go to church on Sundays and holydays under pain of ecclesiastical censure. The result of this obligation is that churchwardens cannot keep any inhabitant out of church whatever the accommodation or want of accommodation. They may as delegates of the ordinary assign the seats (*Asher v. Calcraft*, 18 Q. B. D. 607), but they cannot exclude anyone who enters for divine service; 'for the church is common to everybody,' as Hussey C.J. said so long ago as the reign of Henry VII. Evidently at that time a seat or stool

was in the nature of a usurpation, for in the absence of a prescriptive right 'anybody,' says the Chief Justice, 'may take the seat out of the church and move it away for his ease and standing, for it is a common nuisance to the people who are there, for on account of such seats they cannot have standing room by reason of such seats in the church.' Standing in church, except for the 'gentry,' was the rule until the Reformation. People in those days stood for hours to see the play, and in all weathers, and thought nothing of it. Whose church-going virtue would now stand the test?

No one can wonder at the proprietor of the 'Morning Post' appealing to the law against an 'Evening Post.' 'The world is wide,' as Bowen L.J. observed, 'and there are many names:' but the dishonest assumption of a name without damage is not actionable. Millions are now invested in a name, yet the Copyright Acts give no protection either to the name of a newspaper or the title of a book. To get protection at common law, a reputation by sale must have been built up and the name have got a currency like that of a stamp on a vendible article. Till then anyone may appropriate it, as the defendant in *Licensed Victuallers' Newspaper Co. v. Bingham* (38 Ch. Div. 139: 36 W. R. 433) in fact did. 'As the law stands at present,' says Lindley L.J. in that case, 'I am sorry to say if anyone starts a newspaper under a new name, any other person can adopt the same the next day. That is the law.'

In a lately published book on Montenegro we read that 'un Montén'grin distingué et érudit, M. Bogisich,' has for several years been engaged on a code for Montenegro, which is not yet ready. There are two mistakes in this statement. Mr. Bogišić is not a Montenegrin, and the Civil Code of Montenegro is not only complete so far as he is concerned, but published and promulgated. We hope to give some account of it when a French translation is accessible. Meanwhile those who are anxious for the codification of Hindu and Mahometan law in British India may note that Mr. Bogišić has deliberately abstained from codifying the South-Slavonic customs which still govern the internal economy of Montenegrin families.

The following among other propositions of law have lately been enounced by candidates in an examination for legal honours:—

By leading cases is meant those cases in which principals are laid down by the judges, and which together make up the law of equity.

Powers are used for committing waste, such as cutting timber and opening mines.

You cannot bequeath the residue of Personal Property.

Possession of the deeds is in Equity conclusive evidence of a duly executed mortgage.

A man in his lifetime need not publish a book, but his executor can be made to.

In copyright before publication, the person to whom the copyright belongs may not issue fresh copies of the same till published.

Remoteness of damage is a question for the jury to settle.

Damages must be assessed by the Court; penalties agreed on between parties for breach of contract are illegal.

Damages must not be too trifling, for *de minimis non curat rex*.

A potwalloper was variously defined as

(a) a serf:

(b) a person so poor as not to be able to provide a fire to boil the kettle on:

(c) an official in the north of England who corresponded in position to the town reeve (or Tun-gerefa) in the south. (*Et issint semble que Potwalloper fuist de temps arere companion del Wapentake, que estoit ung officier terrible per l'opinion de Hugo, prout per librum istius V. D. patet cui nomen L'Homme qui rit. Et ad son noeme de pot, testa, et wallop, agitare, pur ceo que quate et brandish le pot deins sa main, come le Wapentake brandish sen iron-weapon: teste V. D. supradicto, loco quo supra. Et est assavoir que quand il wallop son pot toutz les Escossois deins le reaulme fuyoint oustre le First of the Fourth.*)

We have lately found ourselves compelled by want of space to delay the publication of several contributions for a longer time than we should have wished; and it is becoming more and more difficult to find room for papers of real merit and interest offered us not only in England, but from British colonies and possessions and from the United States. The difficulty arises in part from the need of preserving a due proportion among different branches of legal science and interests, as well from the absolute limits of our available space; but this latter cause is the more pressing. The only remedy for this state of things would be to increase the bulk of the REVIEW, and an increase adequate to the purpose would be warranted only by a considerable increase of circulation. It is for our contributors and readers to warrant us therein if they will: not that we are on any other score dissatisfied with our existing condition.

The writer of an anonymous Note on the Married Women's Property Act is requested to communicate his name and address to the Editor.

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THE LAW QUARTERLY REVIEW.

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MARITIME LIEN.

RECENT decisions of the House of Lords, the Judicial Committee of the Privy Council, and the Court of Appeal have gone far to settle the law relating to Maritime Liens as administered in the Courts of Admiralty which follow the maritime law of England. It has now been pointed out that, while on some occasions recourse is had to the jurisdiction *in rem* for the purpose of giving effect to a maritime lien already existing and attaching to the *res*, on other occasions any rights which a suitor may have over the *res* have their origin in the exercise of that jurisdiction, and not in the circumstances which called for it¹. Except in two important particulars the controversy on this subject may now be regarded as at an end, though the reasoning by which the recently accepted distinctions are supported may not be satisfactory to all minds; and it may be questioned to what extent they rest upon any basis of principle, or are in accordance with history, logic, or convenience.

It may now be taken as settled that a maritime lien exists in cases of (1) Seaman's wages (*The Neptune*, 1 Hag. 227, 238, 9); (2) Master's wages and disbursements (*The Sara*, 12 P. Div. 158); (3) Salvage (see the judgment of Lord Stowell in *The Eleanora Charlotta*, 1 Hag. 156; see also the M. S. Act, 1854, 17 & 18 Vict. c. 104, s. 446); (4) Bottomry (*The Tobago*, 5 Rob. 218, 222), and *Respondentia* (*The Cargo ex Sultan*, Swa. 504, 510); and (5) Damage² by collision (*The Bold Buccleugh*, 7 Moo. P. C. C. 267; *The Europa*, Br. & L. 89). On the other hand, there is no maritime lien in favour

¹ The nature and extent of these rights was recently discussed by the Court of Appeal in *The Cella* (13 P. Div. 82).

² It is not intended to discuss here the question of the extent to which the lien for damage is available against an innocent owner. The authorities on the subject are referred to by Mr. Marsden in his article on 'Two points of Admiralty Law' (*LAW QUARTERLY*, vol. ii. p. 369). Fresh light has been thrown on the subject by the judgment of Sir James Hannen in *The Tasmania* (13 P. D. 110).

of the material-man for necessities supplied either to a foreign ship, in virtue of 3 & 4 Vict. c. 65, s. 6 (*The Heinrich Bjorn*, 10 P. Div. 44; 11 Ap. Ca. 270); or to a ship elsewhere than in the port to which she belongs, and of which no owner or part-owner is domiciled in England or Wales, in virtue of 24 Vict. c. 10, s. 5 (*The Two Ellens*, L. R. 4 P. C. 161); or to a ship in a British possession in virtue of 26 Vict. c. 24, s. 10 (10) (*The Rio Tinto*, 9 Ap. Ca. 356); or for the building, equipping, or repairing of a ship, in virtue of 24 Vict. c. 10, s. 4 (*The Lyons*, 57 L. T. N. S. 818; *The Two Ellens*, *ubi sup.* at p. 168). No maritime lien is created by 24 Vict. c. 10, s. 6, in favour of the owner of goods laden on board a foreign ship, and damaged by the negligence or misconduct of the shipowner or his servants (*The Piève Supérieure*, L. R. 5 P. C. 482); nor by s. 11 of the same Act in favour of mortgagees of ships. It is doubtful whether towage confers a lien: the more recent *dicta* both in the House of Lords and the Court of Appeal are opposed to its existence (see the judgments in *The Heinrich Bjorn*, *ubi sup.*). It is also doubtful whether the damage lien extends to personal injuries.

From the above summary it appears that the maritime lien arises out of services, whether ordinary as those of seamen, or extraordinary as those of salvors; out of express contract, such as is contained in a bottomry bond; or out of collision, which is a tort. On the other hand, services as valuable, and in a sense as necessary as these, may be rendered; and the ship itself may be dealt with by way of mortgage, and no lien will arise, though the Admiralty Court has jurisdiction to entertain claims respecting these matters. It is proposed to inquire whether there are any principles underlying these distinctions, and, if any, what they are; and this inquiry will involve some examination of the various statutory enactments by which the jurisdiction of the Admiralty Court has been from time to time extended, and of the canons which have been laid down for their construction.

'A maritime lien is defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process' (*The Bold Buccleugh*, 7 Moo. P. C. C. at p. 284; Abbot on Shipping, 12th ed. p. 106). It has been more shortly defined as 'a lien without possession,' a definition which, though convenient by reason of its brevity, is obviously insufficient for scientific purposes, since it would include also a 'vendor's lien.' The special peculiarity of this claim or privilege is, that it 'travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.' Thus, up to the value of the property to which it

attaches, and subject to the possibility of other liens existing or arising, which may have priority, a maritime lien affords a very effective security to the person in whose favour it has been created, and will defeat a subsequent purchaser who has no notice of its existence. A clear statement of what is understood by the term 'Maritime Lien' will be found in the judgment of Curtis, J. in the American case of *The Young Mechanic*, 2 Curt. 404. After accepting (p. 410) as 'an accurate description of a Maritime Lien,' the definition given by Pothier of an hypothecation—'The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price. This is a right in the thing, a *jus in re*'—he goes on to say, 'It is not merely a privilege to resort to a particular form of action to recover a debt. . . . It is an appropriation made by the law of a particular thing as security for the debt or claim; the law creating an incumbrance thereon, and vesting in the creditor what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser.' The words 'special property' are perhaps open to exception, as suggesting a right of dominion which might under some circumstances be exercised without the aid of a court of law, whereas in fact the person in whose favour a maritime lien exists never does acquire any property in the thing affected by it (see the judgment of Lord Stowell in *The Tobago*, 5 Rob. at p. 222); but if we substitute the word 'right' for those words, we shall have a sufficiently full and accurate definition for all practical purposes.

The question has been much agitated whether during the period immediately preceding the extension of its jurisdiction, which was begun in 1840, the Court of Admiralty entertained suits *in rem* in any case in which there was not an existing maritime lien. This question will call for observation later. Whatever the answer may be, it is certain that that court exercised a jurisdiction *in personam* in such cases. It is also agreed that, prior to 1840, the jurisdiction *in rem* was exercised in all the cases which have been referred to above as giving rise to a maritime lien, except the second (master's wages and disbursements), and subject to this, that in cases of salvage or collision there was no jurisdiction where the cause of action arose within the body of a county. In all these cases the jurisdiction *in rem* was employed to enforce a maritime lien which already existed. On the other hand, the Admiralty Court would not entertain suits *in rem* for necessities where there had been no hypothecation of the ship, and it is undoubted that the supply of necessities conferred no maritime lien on the person supplying

them (see *Justin v. Ballam*, 1 Salk. 34; *The Neptune*, 3 Hag. 129; 3 Kn. 94).

Under these circumstances was passed the Act of 1840, the sixth section of which provides 'that the High Court of Admiralty shall have jurisdiction to decide all claims . . . in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessities furnished in respect of which such claim is made.' The jurisdiction of the High Court of Admiralty was further extended by the Admiralty Court Act, 1861, of which it will be sufficient to notice four sections: By sect. 5, 'The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs.' By sect. 6, 'The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, by the negligence, &c. of the owner, master, or crew of the ship unless (in the case of each section) it is shown that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales.'

Previously to the last mentioned statute it had been enacted by sect. 191 of the M. S. Act, 1854, that 'every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which . . . any seaman . . . has for the recovery of his wages; and if in any proceeding in any Court of Admiralty . . . touching the claim of any master to wages any right of set-off or counterclaim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts . . . between the parties to the proceeding, and to direct payment of any balance which is found to be due.' It was further provided by sect. 10 of the Admiralty Court Act, 1861, that 'the High Court of Admiralty shall have jurisdiction . . . over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship.' By sect. 35, 'The jurisdiction conferred by this Act . . . may be exercised either by proceedings *in rem*, or by proceedings *in personam*.'

It will be observed at the outset that if we omit for the present 'towage' from our consideration, the several subject-matters dealt with by the above quoted sections may be divided into two

classes: those, namely, in respect of which prior to 1840 the Admiralty Court exercised jurisdiction *in rem* enforcing a maritime lien; and those in respect of which it exercised no such jurisdiction. To the latter class belong necessities, damage to goods, and master's wages and disbursements; as regards the last mentioned of which, it is to be observed that the court always exercised jurisdiction over the closely allied subject of Seamen's Wages, and that before the passing of the Act which gave the court jurisdiction over master's claims for disbursements, a maritime lien had, by express enactment, been conferred upon masters for their wages.

The use of the general words 'shall have jurisdiction' has given rise to much discussion as to whether, in respect of certain of the subject-matters dealt with, they confer a maritime lien. At first sight it would appear that, if those words are sufficient to confer such a lien in one case, it should follow that they do so in another. At least it would seem that, if they confer a maritime lien in connexion with one kind of claim, they must do so in connexion with another kind of claim, in respect of which jurisdiction is given by the same section, and which is separated from the former by the disjunctive particle only (see *The Two Ellens*, L. R. 4 P. C. at p. 167). 'The truth is,' however, to use the words of Lord Bramwell (11 Ap. Ca. 282), 'that the legislature was not thinking of a maritime lien, and if it has been given, it has been so unintentionally.' Accordingly the courts have seen their way to discriminating between the different subject-matters over which the jurisdiction of the Court of Admiralty has been from time to time extended; and the classification above hinted at has afforded them a canon of construction in following out the process of discrimination. This canon of construction may be formulated as follows:—Where the effect of the enactment has been to widen, or remove the limits placed upon, a jurisdiction *in rem* already existing and founded on a maritime lien, the maritime lien accompanies the enlarged jurisdiction, and is coextensive with it. But where the effect has been to give the court a new jurisdiction, or to enlarge a jurisdiction previously existing, whether *in rem* or *in personam*, without a maritime lien, no maritime lien is conferred in the absence of express words creating it. (See the judgment of Dr. Lushington in *The Mary Ann*, L. R. 1 A. & E. 8; and that of Lord Esher, M.R. in *The Sara*, 12 P. Div. at p. 162.)

It cannot be denied that the principle here stated is a reasonable one, though it has been, and may again be, found to be difficult of application. In accordance with it, it is held that damage within the body of a county confers a maritime lien (*The Bold Buccleugh*, 7 Moo. P. C. C. 267. The point was not argued, but there is little

probability of its ever being raised with success. See per Lord Bramwell, 11 Ap. Ca. at pp. 282, 283). Common Practice admits the same right as resulting from salvage services rendered within the body of a county. Upon the same principle it has been held that, a statutory lien for their wages having been conferred upon masters, and made available under certain conditions and circumstances for the recovery of disbursements also by s. 191 of the M. S. Act, 1854, the extended privileges conferred upon them by the 10th section of the Admiralty Court Act, 1861, carried with them an extended maritime lien. (See *The Mary Ann* and *The Sara*, *ubi sup.*) On the other hand, and in accordance with the same principle of construction, it has been held, as pointed out above, that the various enactments which have given to Courts of Admiralty jurisdiction to entertain claims for necessities and for damage to goods confer no maritime lien on persons entitled to prefer such claims: nor does it appear to have ever been contended that either sect. 3 of the Act of 1840, or sect. 11 of the Act of 1861, which empower the Admiralty Court to entertain claims by mortgagees, gave rise to such a lien. (See the remarks of Dr. Lushington in *The Mary Ann*, *ubi sup.*)

The inconvenience of the canon of construction under discussion arises from the fact that it involves in each case an historical inquiry as to whether the Court of Admiralty exercised jurisdiction over the subject-matter in question, and if so, what was the nature of the jurisdiction exercised. It is also open to the objection that it suggests no reason founded on principle for the existence of a maritime lien in some cases, and its non-existence in others.

The first mentioned inconvenience may be illustrated by reference to the cases of necessities and towage. Although it is clear that the Court of Admiralty, prior to 1840, exercised, in the absence of a bottomry bond, no jurisdiction over claims for necessities supplied, as is usually the case, on the land, whether in this country or abroad; it is by no means clear that that court would have refused to entertain a suit for necessities supplied on the high seas, if any such case could be supposed to arise under circumstances not amounting to a salvage service. Nor is it at all clear how such a jurisdiction, if exercised, could have been prohibited, seeing that it would not have been obnoxious to the statutes of Richard II. Authority, so far as it goes, seems to favour the existence of such a jurisdiction. Thus Sir Edward Coke concludes (6 Rep. Admiralty, Part xii, p. 79): 'the Admiral hath jurisdiction to adjudge things done upon the high seas, from whence no *pais* may come; . . . without question, so long as there hath been trade and traffic . . . there was marine jurisdiction to redress . . . offences

upon the sea; and to determine all contracts made there.' And Comyn's Digest, Title Admiralty, E. 19, ed. 1793, contains the following:—'So the Admiralty shall have jurisdiction upon contracts made *super altum mare*.' 'So he (the master) may hypothecate the goods, or the ship. . . . And every contract of the master, by the law marine, imports an hypothecation. [And though the contract for repairs be made upon the land, and the money paid there, yet as the cause of hypothecation arises upon the sea . . . the suit shall be in the Admiralty Court.]' The words in brackets do not appear in the original edition. They are in accordance with the decision in *The Trident* (1 W. Rob. 31). From the passage quoted it would seem to have been the opinion of the editor not only that the Admiralty Court had jurisdiction over all contracts made at sea; but also that such contracts *imported an hypothecation*, that is, conferred a maritime lien; whereas an express hypothecation by bottomry bond would confer jurisdiction on the court, though the contract for repairs was made on land, provided that the circumstances giving rise to it occurred at sea. And this view may throw light on some of the early decisions¹, which are very obscure, owing to the impossibility of ascertaining the facts on which they were founded, and not easy to reconcile.

On the other hand, there is good reason for supposing that the arrest of ship or goods was in its origin merely a means of securing the appearance of the defendant in a maritime cause, and enabling the court to give effect to its judgment in default of such appearance. (See the judgments of Dr. Lushington in *The Alexander Larsen*, 1 Wm. Rob. 288, 294; and *The Volant*, 1 Wm. Rob. 383, 387, 388; 1 N. of C. 508, S. C.) Upon this supposition it would appear that the doctrine of maritime lien is a later outgrowth from the practice of arrest. Certainly no suggestion of a maritime lien, or an implied hypothecation, is to be found in Clerke's Praxis (ed. 1722; the book was originally published about the close of the sixteenth century), where it is expressly stated (art. 41) that the priority of different claimants against the same fund is to be determined by the dates at which they commenced their respective suits,—the rule recently applied by the Court of Appeal between the conflicting claims of plaintiffs taking statutory proceedings *in rem*, and not entitled to a maritime lien (*The Cella*, 13 P. Div. 82). In this view, in order to arrive at the true construction of the sections extending the jurisdiction of the Admiralty Court over claims for necessities, it would become material to inquire, not only whether such jurisdiction had ever been exercised over such claims when

¹ *E.g. Watkinson v. Barnardiston*, 2 P. Wms. 367; *Justin v. Ballam*, 2 Ld. Raym. 835; *Bridgeman's Ca.*, Hob. 11.

they arose entirely on the high seas, but also whether it had been exercised at any time since the right to arrest the ship or goods of an absent defendant developed into a right of maritime lien. It is sufficient to indicate the possibility of such an inquiry being necessary, in order to demonstrate the inconvenience of the canon of construction under consideration.

Since the decisions in *The Heinrich Bjorn* and *The Rio Tinto* (*ubi sup.*) the discussion of the questions just touched upon, however interesting it may be in an historical point of view, has become, so far as necessities are concerned, entirely academical. It may nevertheless acquire a practical importance whenever the question is definitely raised, as it probably may be in the not distant future, whether *towage* confers a maritime lien. It is sufficient to indicate here, so far as the ancient jurisdiction of the court is concerned, that *towage* may be said to occupy a position intermediate between salvage and necessities. It has more in common with the latter than with the former, for it arises out of contract; but that contract is one which in the nature of things would, as often as not, be entered into and performed upon the high seas, and would therefore, prior to the recent statutes, have fallen from time to time within the jurisdiction of the Court of Admiralty. It follows, that, although, as was pointed out by Dr. Lushington in *The Wataga* (Swa. at p. 167), the practice of obtaining *towage* services is of recent origin, the old authorities may furnish us with principles for determining, apart from statutory extensions of jurisdiction, the relation of the Court of Admiralty to claims for such services. It is probable that, if the question of the existence of a maritime lien for *towage* services depended upon the old authorities only, the courts would have no difficulty in relegating such services to the same category as necessities, and declaring against that privilege. The tendency of recent *dicta* is certainly in that direction. (See per Lord Bramwell in *The Heinrich Bjorn*, 11 Ap. Ca. at p. 283, and per the Court of Appeal in the same case, 10 P. D. at p. 52.) But with the greatest respect, it is pointed out that these *dicta* were not necessary to the decision of that case, and submitted that the question is still open for discussion.

Notwithstanding the statement of Dr. Lushington in *The Wataga* (*ubi sup.*), decided in 1856, that the Court of Admiralty, prior to the statute of 1840, 'had not jurisdiction over simple *towage*, which was only then coming into use,' it would seem that that court did exercise jurisdiction *in rem* in cases where salvage was claimed, but the services amounted only to 'simple *towage*' (see *The Isabella*, 3 Hagg. 427, which came before Sir John Nicholl in 1838). If then it could be shown that, whatever may have been the practice at the

beginning of the last century, in the words of Lord Watson (11 Ap. Ca. 278), 'at the time when the Act of 1840 was passed it was not the practice of the Admiralty Court to sustain an action *in rem*, except at the instance of a plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed,' it would seem to follow that a maritime lien was recognised, in certain circumstances at least, as arising out of towage services, prior to the passing of that Act. The proposition above quoted appeared to Lord Watson to be borne out by the authorities cited; although a contrary opinion is decidedly expressed by Lord Fitzgerald (p. 286), and somewhat less strongly by Lord Bramwell (p. 284). With regard to the latter view it is respectfully pointed out that it goes further than was necessary for the decision of the case before the House; that no authorities in support of it are referred to by those noble lords; and that it is in direct conflict with the deliberate opinion of the Privy Council expressed in the cases of *The Neptune* (3 Kn. at p. 116), and *The Bold Buccleugh* (7 Moo. P. C. C. 267).

In this connexion it may be pointed out that the collocation of the words composing the sixth section of the Act of 1840, the material parts of which are set out above, is such as to favour the view that the legislature regarded 'claims . . . in the nature of towage' as belonging rather to the same category with 'claims . . . in the nature of salvage for services rendered to, or damage received by, any ship,' than to that of 'claims . . . for necessities supplied.' This view derives support from the language of Dr. Lushington in *The Ocean* (2 Wm. Rob. at pp. 370, 371), where he says, 'The former part of this section is intended to refer generally to all ships or sea-going vessels, whilst the latter is to receive a more limited construction, and is to be confined exclusively to foreign vessels. The intention of the legislature in thus framing the section is, I conceive, obvious upon the face of it. Before the statute was passed, all claims for salvage, and all questions of damage, as also all demands for towage services, when the transaction took place within the body of a county, were cognizable in the courts of law alone. . . . For the convenience of parties who might so render services, or receive a damage, it was deemed expedient to restore the ancient jurisdiction of the Court of Admiralty. . . . So much for the earlier portion of the sixth section. It remains that I should now consider the clause with respect to necessities supplied to "any foreign ship or sea-going vessel." These I have already stated are confined exclusively to foreign vessels.' On the other hand, it must be admitted that a contrary opinion is expressed in the judgment of the Court of Appeal in *The Heinrich Bjorn* (10 P. D. at p. 52), where it is stated that the section conferred jurisdiction 'for

towage services rendered to any foreign ship,' a construction which it is submitted is unnatural and would limit the scope of the section in a manner never intended by the legislature.

Before quitting this part of the subject it should be pointed out that authority, so far as it went, before the recent decisions with regard to necessities, favoured the existence of a maritime lien for towage services: though the point was never raised in argument. Thus in *La Constancia* (4 N. of C. 512, decided in 1846) claims for towage were allowed to rank, along with wages, in priority to previous bottomry bonds: and the same principle was adopted without discussion in *The St. Lawrence* (5 P. D. 250).

Again, in a case recently heard before Mr. Justice Butt (*The Victoria*, 13 P. D. 125) as to the distribution of the fund among the various claimants in a limitation of liability action, the learned judge threw out a suggestion in the course of the argument, that personal injuries inflicted by a ship might confer a maritime lien. On principle it would seem difficult to deny the justice of this view, or to formulate a satisfactory reason why damage occasioned to a man's property should give rise to rights of a higher nature, and be the subject of a more effective remedy than an injury occasioned under the same circumstances to his person. There appears, however, to be no authority establishing the existence of a lien in the latter case, although there is abundant evidence of the jurisdiction of the Admiralty over personal torts arising on the high seas. (See for example *The Ruckers*, 4 Rob. 73; *The Agincourt*, 1 Hag. 271; and the judgment of Story, J. in the American case of *De Lovio v. Boit*, 2 Gallison, 398, where the question is discussed at length.) In all these cases, however, the action was *in personam*, and the language of Story, J. is in accordance with this circumstance:—'Nothing is more common than a libel against the master or owner *in personam*. In respect also to personal torts on the high seas, the process is necessarily *in personam*.' Still there is no good reason apart from authority, why, where the injury is 'physically caused by the ship,' to use the language of the Master of the Rolls in *The Vera Cruz* (9 P. Div. at p. 99), 'as if a man were injured by the bowsprit of a ship,' the process should not be *in rem*. The state of the authorities, however, is such, that in all the cases in which it has been sought to establish a right *in rem* in respect of personal injuries or loss of life occasioned by collision, reliance has been placed rather upon sect. 7 of the Admiralty Court Act, 1861,—'The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship,'—coupled with sect. 35, than upon the ancient practice of the Court in such cases. (See *The Sylph*, L. R. 2 A. E. 241; *The Vera Cruz*, 10 Ap. Ca. 59; 52 L. T. N. S. at

p. 474, where the argument on this point is better reported; and the language of Cockburn, C.J., in *Smith v. Brown*, L. R. 6 Q. B. at p. 731,—‘Whatever may have been the pretensions of the Court of Admiralty in ancient times to jurisdiction in the matter of personal injuries arising on the high seas, . . . it is admitted that as regards personal injuries caused by collision, no such jurisdiction, independently of recent statutes, has existed in modern times.’) Authority, therefore, or rather the absence of it, seems opposed to the existence of a lien for personal injuries; and it cannot, consistently with the above canon of construction, be contended that sect. 7 of the Admiralty Court Act, 1861, is sufficient by itself to confer a maritime lien, even if the word ‘damage’ be construed to include personal injuries, a construction which is still open to question. (See *Smith v. Brown*, L. R. 6 Q. B. 729; *The Franconia*, 2 P. Div. 163; *The Vera Cruz*, 9 P. Div. 96; 10 Ap. Ca. 59.)

So stands the question with regard to statutory enactment and authority. It will now be well to consider whether the existence or non-existence of a maritime lien in particular cases is determined by relation to any principles, and if so, what those principles are. And this again may assist in the solution of the question with regard to towage and personal injuries, by enabling us to see whether they in their nature fall within or without such principles.

For this purpose, if the several matters which give rise to maritime lien be examined, it will be found that they contain at least one common element, and that, if classified, they will fall into groups, the components of which contain certain other common elements. Those matters, it will be remembered, are (1) Wages (including for this purpose master’s disbursements); (2) Salvage; (3) Bottomry (including *respondentia*); and (4) Damage. The element which is common to all these is the general¹ impossibility of inquiring at the time when the liability arises as to the character and circumstances, or even, in some cases, the whereabouts of the persons rendered liable. This element may be elliptically formulated as ‘Inaccessibility of owner.’ It may be objected that it is not necessarily present in the case of wages. But a moment’s consideration will show that the shipping business could not be carried on unless seamen were usually—nay almost invariably—engaged without any communication with the owner of the ship; and that, as regards master’s wages, although in most cases the master com-

¹ See as to bottomry *La Ysabel* (1 Dod. 274, 5). This proposition is not of course intended to be taken as universally true. Circumstances for example can be conceived in which an owner himself might be compelled to enter into a bottomry bond, either because his credit was difficult to inquire into, or because he had none: not to mention the frequent case of salvage services rendered to vessels known to belong to individuals or companies whose solvency was never in doubt.

municates directly with his owner, and has the opportunity of inquiring into his position and circumstances, occasions very frequently arise upon which a master has to be appointed at a distance from the home port, and without any such opportunity. It is further to be remarked that the master, prior to the passing of the M. S. Act of 1854, had no lien either for wages or disbursements, and that consequently, if his case be an exception, it is emphatically the exception which proves the rule.

Beyond this, it is true that damage has little, if anything, in common with wages, salvage, and bottomry. But, on the other hand, it is to be pointed out that the three last mentioned are characterised by the common element of necessity. Each of them is, in the circumstances, essential to secure the successful termination of the voyage. It is unnecessary to refer to authority for the establishment of this proposition with regard to wages and salvage. That it is true as regards bottomry appears from the language of Dr. Lushington in *The Trident* (1 Wm. Rob. at pp. 31, 32), where he says,—‘The jurisdiction of this court to inquire into their validity’ (i. e. the validity of bottomry bonds) ‘does not depend upon the mere locality of the residence of the owner. It depends, I think, upon the absolute necessity of the case’; and this necessity he defines as follows:—‘Where the master is in such a condition that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship.’ (See also as to *respondentia* The cargo *ex Sultan*, Swa. 504, 510; and the definition of the conditions necessary to a valid bottomry bond by the present Master of the Rolls in *The Gaetano and Maria*, 7 P. Div. 137, 144.)

It is further to be observed that salvage, bottomry, and damage have an element in common which wages have not: that, namely, of emergency. The liability arises from the occurrence or continuance of sea perils which could not be, or at any rate were not, foreseen. There are also special considerations founded on public policy, and applicable to the cases of wages, salvage, and damage. In the first two cases a justification for the existence of a maritime lien may be found in the importance of encouraging seamen and salvors to spare no effort which may tend to the safety of ship and cargo. In the last case such a justification may be found in the necessity of giving to the owners of ships every inducement to insist upon their being navigated with due regard to the safety of other vessels and the preservation of human life. Lastly, it is to be borne in mind that a bottomry bond has this special feature, that its validity depends upon the holder of it taking the ‘maritime risk.’ In the cases of wages, salvage, and damage, and in the

ordinary case of necessities, if the *res* is lost, claims can still be enforced *in personam*. In bottomry, if the ship perish *in itinere*, the loss falls entirely on the lender (see *The Atlas*, 2 Hag. 48, 57; *The Royal Arch*, Swa. 269, 280, 282; *Cochrane v. Gilkison*¹, 16 Court of Sess. Cas. Sc. 548): a circumstance which affords a special reason for insuring to the lender the enjoyment of his security, when the voyage is successfully accomplished.

Proceeding to generalise, it appears that in every case of maritime lien we find among the circumstances in which it arose, the inaccessibility in general of the owner of the property subject to the lien, coupled with two at least of the following elements, namely, necessity, emergency, some ground of public policy justifying the lien.

Let us turn now to two of the most important of the claims against shipowners, which, while having something in common with the four above mentioned, confer no maritime lien, namely, 'necessaries' and general average. With regard to 'necessaries,' it is to be observed that no enactment was needed to give the Court of Admiralty jurisdiction where there was a bottomry bond. It may also be presumed that a bottomry bond would be given wherever the circumstances justified it. The object of the legislature, as embodied in the statutes of 1840 and 1861, would therefore appear to be to give the Court jurisdiction *in rem* over claims for necessities in cases where, although the owner was or might be presumed to be inaccessible, a bottomry bond would not be sustained; in other words, over claims for necessities supplied, paradoxical as it may seem, under circumstances not amounting to 'necessity' as defined above². Here we have a case of a liability accompanied by 'inaccessibility of owner,' but unaccompanied by any of the other elements above enumerated. It has been held not to give rise to a maritime lien.

¹ In that case a bill was drawn by the master upon his owners, by way of collateral security, it being arranged that the bond should be cancelled on the acceptance of the bill. The ship having been lost, it was held that the owners were not personally liable. It does not appear to have been settled, whether, where a bill has been drawn by way of collateral security for money advanced on bottomry, and accepted, the acceptance would have the effect of avoiding the bond as putting an end to the maritime risk taken by the bondholder, or whether the bill itself would be held to be subject to that risk. The latter view appears to have been held in America (*The Hunter*, Ware, 252, 3). It would seem that one of these results ought to follow, consistently with the doctrine referred to in the text. On the other hand, it appears to have been the view of the Exchequer Chamber in *Stainbank v. Shepard* (13 C. B. at p. 444) that, in order to discharge the bottomry, the bills must be not only accepted but paid. The question is perhaps hardly likely to arise in practice.

² This statement appears at first sight to conflict with the language of Dr. Lushington in *The Ocean* (2 W. Rob. 368); but it is submitted that it is in accordance with more recent decisions of the same learned judge (e.g. *The Perla* and *The West Friesland*, Swa. 353, 454); and with the considered judgment of Sir Robert Phillimore in *The Riga* (L. R. 3 A. & E. 516, 522), where a liberal interpretation is given to the word 'necessaries.'

The liability to a general average contribution arises from the necessary sacrifice of a portion of the venture, in order to save the remainder from the perils of the sea. It takes its origin in necessity and emergency. But it arises between shipowner and cargo-owner, who have already entered into the contract of carriage the one with the other, and who may be presumed to have made all prudent inquiries as to one another's solvency. The element 'inaccessibility of owner' is absent; and although the shipowner has a common-law lien on the cargo for the payment of its contribution, which he is bound to exercise for the benefit of those cargo-owners who are entitled to receive contribution (*Crooks v. Allan*, 5 Q. B. D. 38), no maritime lien arises.

If the foregoing discussion be of any value, it ought to assist in determining the question raised with regard to towage. Does a service of that nature fall within the principles upon which a maritime lien rests, or outside them? In general the owner of the vessel to which the service is rendered is inaccessible. But it does not appear that any of the other conditions found to exist in cases where a maritime lien arises are present. It cannot be said that there is emergency; for, if there were, the service would amount to salvage; nor that there is necessity in the strict sense, for towage consists only in expediting the vessel,—in enabling her to traverse more quickly ground which she might traverse in a longer period of time unassisted. Neither are there any grounds of public policy for giving an especial privilege to the owner of the tug. In the result, towage appears to occupy a position closely analogous to that of 'necessaries,' and on principle should be treated on the same footing. Applying the same test, it would seem that personal injuries arising from collision ought on principle to stand on the same footing as damage to property, but having regard to the authorities, it is apprehended that this result can only be effected by the legislature.

An attempt has here been made to summarise the law as to the existence of a maritime lien in particular cases; to formulate and examine the rule of construction which has been applied in determining whether recent enactments have conferred such a lien, and to illustrate the difficulties attending its application, by reference to the still unsettled case of towage; lastly, to inquire whether the result of the authorities is such as to place the existence of a maritime lien upon any foundation of principle. It is not pretended that these questions have been exhaustively dealt with; but it is hoped that enough has been said to establish the proposition that there are certain conditions essential to the creation of a maritime lien, and without which no such lien can arise. These

conditions appear to furnish the groundwork of a principle which should be of service in determining the question of the existence of the lien in particular cases. There may be those who would desire to see a more extended application of the privileges which a maritime lien confers, a question which it is not intended to discuss here ; but if the conclusion arrived at be well founded, it follows that, however inconvenient, the rule which has been adopted for the construction of the statutes dealing with the subject is not unsatisfactory in its results ; though it is perhaps to be regretted that the courts have not expressly defined the principles upon which the maritime lien depends, and indicated the conformity of their decisions with those principles.

JOHN MANSFIELD.

THE TERMS REAL AND PERSONAL IN ENGLISH LAW.

ALTHOUGH the real actions of English law were abolished more than fifty years ago, and had fallen out of use about two centuries before¹, yet it may not be uninteresting to inquire into the ancient classification of actions, which appears to have given rise to the present curious distinction between real and personal property. Actions, according to English law, were either real or personal or mixed. This division appears to have been first made by Bracton:—‘Et sciendum, quod omnium actionum, sive placitorum (et inde utatur aequivoce) hæc est prima divisio, quod quaedam sunt in rem, quaedam in personam et quaedam mixtae².’ It is followed in Fleta:—‘Placitorum aliud personale, aliud reale, aliud mixtum³.’ And the same distinction is made in Britton and the Mirror⁴, and is handed down by Littleton, Coke⁵ and Blackstone⁶. The following passages from Britton and Littleton are worthy of note:—

Britton, lib. ii. cap. ii, fol. 83 b⁷: ‘Passé la fourme et la manere de pleder personels pletz pledables par attachementz de cors ou destresces des biens moebles, ore fet a dire de terre pledable par attachementz de mesmes les choses demandez.’ Lib. iii. cap. iii, § 1, fol. 183 b: ‘Une manere de accioun i ad pledable en nostre court qe est appelé mixte, pur taunt qe ele touche la persone vers qi la demaunde est fete, et estre ceo touche la chose demaundé; et par taunt est ele pledable par personeles destresces et ausi par reales . . .’

Littleton, sect. 492: ‘Item, quant a relesses daccions realx et personelx, il est issint, que ascuns accions sont mixtes en le realte et en le personalte; sicome un accion de waste sue envers le tenaunt a terme de vie, cest accion est en le realte, pur ceo que le lieu waste serra recovere; auxi est en le personalte, pur ceo que les trebles damages serront recoveres pur le tort et wast fait per le tenaunt . . .’

The authorities cited enable us to observe how the English words *real action* and *personal action* came to be used as equivalent to the Latin terms *actio in rem*, *actio in personam*, which Bracton borrowed from Roman law⁸. Bracton, however, in applying these expressions to English law, was unable to use them in exactly the same signi-

¹ See 3 Black. Comm. 197, 202.

² Bracton, lib. iii. cap. iii. par. i. fol. 101 b; see also lib. iv. cap. i. § 1, fol. 159 b.

³ Fleta, lib. i. cap. i.

⁴ Chap. ii, secta. 1, 4; see also chap. iv, secta. 5-8.

⁵ Co. Litt. 284 b: ‘Of actions concerning common pleas Littleton speaketh in this place. And these are threefold (that is to say), real, personall and mixt.’

⁶ 3 Black. Comm. 117.

⁷ See also lib. i. ch. i. § 2, fol. 1 b.

⁸ The expression *actio personalis* is used by the Roman jurists as equivalent to *actio in personam*, but the term *actio realis* is not found in the books composing the *Corpus Juris Civilis*; Savigny, *System des heutigen Römischen Rechts*, v. § 206, n. (g).

fication as they bore in the legal system of their origin. It followed that the English real and personal actions did not correspond with the Roman *actiones in rem vel in personam*. It is worth while to note the difference.

In Roman law the principal division of actions is said to be into actions *in rem* and actions *in personam*¹. Of this classification various explanations ('full of most excellent differences') have been given². The ingenuity of commentators has been chiefly exercised over the *actio in rem*; for the *actio in personam* is not found to be the subject of controversy. An *actio in personam* was the remedy which gave effect to an *obligatio*. This action therefore was founded upon a claim to some act or forbearance on the part of the defendant personally; it put in issue the question, whether the defendant was bound in law to the plaintiff by the link of an *obligatio*, that is to say, whether the defendant was subject to a personal duty arising from contract or *quasi ex contractu*, or from delict or *quasi ex delicto*, to make his conduct conform in some particular to the plaintiff's satisfaction³. In other words, *actio in personam* was an action against a particular person to enforce the plaintiff's right to an act or forbearance on the part of the defendant. When we attempt to define an *actio in rem*, the matter is complicated by the fact that the Roman jurists used the expression *in rem* in two senses; either as meaning 'against a thing' or as meaning 'generally' or 'impersonally'⁴. The expression *actio in rem* may therefore be translated either 'impersonal action' or 'action against a thing'⁵. *Actio in rem*, as meaning an impersonal action, appears to be an action which is not based on a mere claim against the defendant personally; which does not raise the question of the existence of an *obligatio* between plaintiff and defendant, and therefore of a personal duty of action or forbearance on the defendant's part for the plaintiff's satisfaction⁶. *Actio in rem*, as meaning an action against a thing, appears to be an action wherein the plaintiff claimed some corporeal thing as his own, or made a direct claim to one of those rights (other than *obligatio*) which the Roman jurists called *res incorporales*; such were *usufructus*, *servitudes*, *hereditas*⁷. If we prefer to place the claim of ownership along with the other claims of right and to use the word things as meaning

¹ Inst. IV. vi. 1; Savigny, System, § 206.

² See Savigny, System des heutigen Römischen Rechts, v. §§ 206-209; Windscheid, Die Actio des Römischen Civilrechts, 1856; Ortolan, Explication historique des Institutes, §§ 1952 et seq., vol. iii. p. 538, 10th ed., 1876; Vangerow, Lehrbuch der Pandekten, § 113, p. 167, 7th ed., 1876; Windscheid, Lehrbuch des Pandektenrechts, §§ 40, 45, pp. 97, 108, 8th ed., 1882.

³ Savigny, System, v. §§ 206, 207; Windscheid, Die Actio, &c., v. 14, 16.

⁴ See Savigny, System, v. § 208, & n. (a); Windscheid, Die Actio, &c., 8, 9, n. (2), 12; Ortolan, Explication, &c., § 1956.

⁵ See Windscheid, Die Actio, &c., 11-13.

⁶ Ib., 14, 16.

⁷ Gai. II. 14; IV. 3; Inst. II. ii; IV. vi. 1, 2; Savigny, System, v. § 209.

corporeal things regarded as the object of rights, we may perhaps venture to define *actio in rem* in the latter sense as an action wherein the plaintiff does not allege the existence of an *obligatio* between himself and the defendant, and the consequent personal liability of the defendant to do or forbear something for his satisfaction, but puts in issue the question whether he himself is invested with a right availing directly against some thing without the intervention of any other person's action, and correlative to a duty of forbearance imposed on all the world. If we adopt the foregoing explanation, we shall find that *actiones in rem*, meaning impersonal actions, include *actiones in rem*, meaning actions against a thing¹. There were however in Roman law certain actions said to be *in rem* which were not actions against a thing. These were the *actiones praejudiciales*. In Justinian's time these proceedings appear to have been brought to obtain a judicial declaration of right upon a question of *status*; in earlier times they might also be brought to have the existence of certain facts judicially established². The *actiones praejudiciales* have been the chief obstacle in the way of those who have attempted to explain the principal Roman classification of actions. Savigny derives the classification of *actiones praejudiciales* as *in rem* from the fact that under the earlier Roman law questions of *status* might be decided by proceedings in the form of a *rei vindicatio*, which was another term for *actio in rem* (meaning against a thing)³. Windscheid classes these actions as impersonal, because they are not brought to give effect to a claim against the defendant personally⁴. As regards the importation of the term *actio in rem* into English law, the *actiones praejudiciales* may be disregarded; for when Bracton borrowed the term *actio in rem* from Roman law he took it in the sense of 'action against a thing'⁵.

Before proceeding to English law however, we may remark further that, although *actiones in rem vel in personam* were known to the Roman law in the early times of procedure *per legis actiones*, the division of actions into two kinds, those *in personam* and those *in rem*, appears to have been made by the jurists of the period of procedure *per formulas*⁶. At that time it corresponded to a difference observed in framing a *formula in ius concepta*; that is to say, the *formula* in an action brought under the civil law as opposed to the equity of the praetor⁷. This difference appeared in that part of the *formula* called the *intentio*, which stated the right claimed. In

¹ Windscheid, *Die Actio*, &c., 16; *Lehrbuch des Pandektenrechts*, § 45 (2).

² See Savigny, *System*, v. § 207; Windscheid, *Die Actio*, &c., 16-18.

³ Savigny, *System*, v. § 207.

⁴ *Lehrbuch des Pandektenrechts*, § 45 (3).

⁵ See Bracton, lib. iii. cap. iii. par. 3, fol. 102 a.

⁶ See Savigny, *System*, v. §§ 206 n. (a), 209.

⁷ Ortolan, *Explication*, &c., § 1955.

the *actio in personam* the *intentio* was framed so as to put in issue the question whether the defendant was bound to the plaintiff by an *obligatio*, that is, whether he was bound to do or forbear something for the plaintiff's satisfaction. In the *actio in rem* the *intentio* was framed impersonally; it made no mention of the defendant, and did not suggest any personal duty of action or forbearance on his part, but merely raised the question whether the plaintiff was owner of some corporeal thing or was entitled to one of those rights (other than an *obligatio*) called incorporeal things. It is also worthy of remark that in that part of a *formula* called the *condemnatio*, which indicated the judgment to be pronounced, it was always prescribed that judgment against the defendant should take the form of judgment for the payment of a sum of money¹. It is true that in an action *in rem* this form of judgment appears to have been used as the means of indirectly securing restitution of the thing or specific enforcement of the right claimed². Nevertheless the foregoing details with regard to the formulary system of procedure, point to the conclusion that the authors of the principal Roman division of actions did not take the relief afforded by process of execution as the test whereby to recognize the nature of an action *iuris civilis*. They did not distinguish such actions as being *in rem* or *in personam* according to the result of the inquiry, whether the relief to be obtained therein were restitution on the one hand, or compensation only on the other³: but they classified them according to the nature of the right therein asserted by the plaintiff and judicially declared to be valid by judgment in his favour⁴. The actions given by the equity of the prætor were also classified as *in rem* or *in personam* upon the same ground⁵. Here lies the root of the difference between the division of actions made in Roman law and that which obtained in our own system. For, as the Roman jurists distinguished actions according to the nature of the right thereby asserted, apart from the question of the possibility of the specific enforcement thereof, they had no reason, in determining the nature of an action to establish a claim of ownership over some corporeal thing, to have regard to any physical difference in the things, which may be the objects of ownership. Land might be the object of *dominium ex jure quiritium* as well as a slave, an ox, a horse or an ass⁶. The same right of ownership was asserted, whether a man claimed a piece of land, a

¹ Gai. IV. § 48: 'Omnium autem formularum quæ condemnationem habent ad pecuniariam aestimationem condemnatio nunc concepta est. Itaque etsi corpus aliquod petamus, velut fundum, hominem, vestem, aurum, argentum, iudex non ipsum rem condemnat eum cum quo actum est, sicut olim fieri solebat, sed aestimata re pecuniam eum condemnat.'

² See Savigny, System, vi. § 287; Ortolan, Explication, &c., § 1937.

³ See Holland, Jurisprudence, p. 243.

⁴ See Savigny, System, vi. § 287.

⁵ Ortolan, Explication, &c., § 1959.

⁶ Gai. II. §§ 15-25, 40-42; Ulp. Frag. xix.

slave, or a flock of sheep as his own. Accordingly, from the earliest times of Roman law an *actio in rem* was applicable to the assertion of a claim of ownership over a moveable as well as over an immoveable corporeal thing¹. The fact that land is immoveable and indestructible, while slaves and cattle are moveable and destructible, made no difference in the legal nature of the action which protected the owner's right².

Let us now turn to English law. Here we find the classification of actions to be founded on the following distinction:—In some proceedings the restitution of a thing claimed, the specific enforcement of a right violated, may be directly effected by the strong hand of the law, that is to say, by process of execution dealing directly with the thing, which is the object of the right infringed. In other proceedings all that can be obtained is pecuniary compensation for a violation of right; what the English law calls damages³. It is accordingly laid down by Lord Coke that every action, wherein damages only are recovered by the plaintiff, is in law taken for an action personal⁴. The mark of a real action is that therein process of execution might issue against the thing, which is the object of the right claimed. The thing itself was taken into the strong hand of the law and disposed of according to the judgment pronounced in the action. Thus a real action was a remedy wherein restitution or specific enforcement of right might be directly obtained. Mixed actions partook of the nature both of real and personal actions; that is to say, they were brought to obtain damages from the defendant personally as well as the restitution of some thing or the specific enforcement of some right by process issuing directly against the object of the right.

Now this view of the classification of actions is quite different from the Roman. It does not put forward the nature of the right asserted in an action as the test of the nature of the action; but it distinguishes actions according to the process of execution obtained therein. Let us see how Bracton, in applying the Roman terms *actio in rem*, *actio in personam* to English law, distorted their meaning, and used them in such a sense that the terms *real* and *personal*, as applied to actions and things in English law, have ever since been current with the notion of compensation attached to the one, and of specific restitution to the other.

Bracton, having classified actions as real, personal, or mixed⁵, defines personal actions as those which lie against any one on the ground of contract *vel quasi*, or wrong *vel quasi*, when one is bound to give or to do something⁶. He then proceeds:

¹ Gal. IV. §§ 3, 16, 17, 48.

² Cf. Williams on Real Property, 1.

³ See 2 Black. Comm. 438.

⁴ Co. Litt. 288 a.

⁵ Lib. iii. c. iii. § 1, fol. 101 b.

⁶ Lib. iii. c. iii. § 2, fol. 102 a.

'Actiones vero in rem sunt, quae dantur contra possidentem, qui nomine proprio possideat ex quacunque causa, et non alieno, quia habet rem, vel possidet quod restituere possit, vel dominum nominare: ut si quis petat ab alio rem certam, fundum aliquem, vel terram, et se contendat habere jus et inde esse dominum et persequatur rem illam, et non ejus precium, nec ejus aestimationem, nec tantumdem quod sit ejusdem generis, et sic res corporalis immobilis, quae petitur ex quacunque causa versus aliquem, qui nullo jure personali obligatus est. Et per hoc quod petens rem petitam intendens esse suam, actionem instituerit versus tenentem, et tenens negaverit, in rem erit actio, sive placitum, et hoc sive proprio nomine petat, sive ratione rei, quam ipse possidet, sicut viri religiosi vel rectores nomine ecclesiarum suarum, vel alii nomine alicujus universitatis sicut in rem communem, et hoc etiam sive principaliter petat ipsam rem, sive jus quod rei adhaereat sive tenemento, et quod a tenemento separari non possit, ut si quis petat advocationem alicujus ecclesiae, vel communiam pasturae, vel quod liceat ei ire, vel agere, vel quid tale quod consistit in jure, in rem erit placitum, sive actio; quia hujusmodi jura omnia sunt res incorporeales, et quasi possidentur, et insunt corporibus, et acquiri non possunt nec retineri sine corporibus quibus insunt, nec haberi aliquando sine corporibus ad quae pertineant¹. Dictum est supra, si res sit immobilis quae petitur, nunc cum sit res mobilis quae petatur, sicut leo, bos, vel asinus, vestimentum, vel aliud quod consistit in pondere vel mensura. Videtur prima facie quod actio sive placitum esse debeat tam in rem, quam in personam, eo quod certa res petitur, et quod possidens tenetur restituere rem petitam, sed revera erit in personam tantum, quia ille a quo res petitur, non tenetur precise ad rem restituendam, sed sub disjunctione, vel ad rem, vel ad precium, et solvendo tantum precium liberatur, sive res appareat, sive non. Et ideo si quis rem mobilem vendicaverit ex quacunque causa ablatam, vel commodatam, debet in actione sua definire precium et sic proponere actionem suam. Ego talis peto, quod talis restituat mihi talem rem talis precii: vel conqueror quod talis mihi injuste detinet vel robbavit talem rem tanti precii, alioquin non valebit rei mobilis vindicatio, precio non appposito. Idem erit si res mobiles petantur, quae consistunt in pondere, numero vel mensura, sicut massa, pecunia vel triticum, vel aliae quae in liquido consistunt, sicut vinum et oleum, quo casu, si hujusmodi res petantur, sufficit si implacitatus tantumdem restituat quod sit ejusdem ponderis, numeri, generis et mensurae, et unde, quia non compellitur praecise ad rem quae petitur, erit actio in ipsam personam, cum implacitatus per solutionem tantumdem possit liberari².

Bracton, lib. iii. cap. xii. § 6, fol. 114 b: 'Item actio civilis cum aliquando triplex sit, et quasi mixta, scilicet personalis, poenalis et rei persecutoria, sicut de restitutione spoliatorum, quod res corporalis et immobilis restituatur spoliato, vel quod res incorporalis, sicut jus

¹ Bracton, lib. iii. cap. iii. par. iii, fol. 102 a.

² Lib. iii. cap. iii. par. iv, fol. 102 b.

aliquod, in debitum statum reformatur. Sicut dici poterit de servitutibus, ut de jure eundi, agendi, et de jure pascendi in fundo alieno, et hujusmodi: bene poterunt haec omnia unica actione terminari, sicut per assisam novae disseysinae, secundum diversus species disseysinarum. Personalis enim est quia tantum datur spoliato, et competit contra spoliatores in eo, quod poenalis est. Est etiam poenalis propter delictum, quia injuste et sine judicio, et quandoque persequitur spoliatores, si spoliator superstes sit, et in eo quod poenalis est extinguitur per mortem utriusque vel alterius ipsorum. Est etiam restitutoria tantum aliquando, et non poenalis, quantum ad eos qui immunes sunt a delicto disseysinae, quia poenam sentire non debet, qui immunis est a culpa, secundum quod inferius dicetur de assisa novae disseysinae.

It is true that Bracton in one or two other passages makes use of the terms *in rem*, *in personam* in a sense more in accordance with the meaning attached to them in Roman law¹. But we are not concerned with this, for the notions expressed in the passages quoted are those which prevailed; and Bracton's classification of actions according to the nature, not of the right asserted but of the relief afforded therein, remained embedded in our law. The test he put forward, viz. whether the relief afforded in the action were specific restitution or compensation, was that which was adopted; and the Roman view that the nature of actions depends upon the nature of the rights asserted therein, was not applied in English law. Thus we may observe that in the passages which have been already cited from Britton and Littleton² the same test of the nature of an action is taken. In Britton the division of actions according to the nature of the process of execution to be obtained therein is strongly emphasised. Littleton marks clearly the distinction taken between restitution and compensation.

The direct process of execution, which might issue against the thing (that is, the corporeal or incorporeal hereditament) claimed in a real or mixed action, appears clearly in Glanvil, although the distinction between actions *in rem* and *in personam* is not taken in that treatise. Thus if a tenant made default in appearing to the third summons made in an action commenced by a writ of right in the King's Court, the tenement was to be seised into the King's hand and there to remain for fifteen days. If the tenant did not appear within those fifteen days, seisin was to be adjudged to the demandant, and the tenant would have no remedy except by writ of right with respect to the *jus proprietatis*³. So also the tenement was to be seised into the King's hand, if a tenant, who had essoined himself three times, neither came nor sent a sufficient substitute to

¹ Bracton, lib. iii. cap. iii. §§ 2, 5, 7, fol. 102 a, b, 103 a.

² Ante, p. 394.

³ Glanvil, lib. i cap. vii.

answer for him on the fourth day¹; on the non-appearance of the tenant when a day had been given him²; and on the non-appearance to the third summons of a tenant who had found pledges³. We also find the writs commanding the sheriff to put the demandant in possession of the land claimed on the tenant's making default⁴, after trial by battle⁵, after judgment by the grand assise⁶, or after an assise of mort d'ancestor⁷. Again, in actions claiming an advowson, the presentation to the church or the advowson itself was to be seised into the King's hand on the final default of the patron in possession⁸. Similar direct process of execution appears in the case of an assise of novel disseisin⁹.

The process in personal actions was widely different. With the single exception of proceedings in replevin, mesne process in personal actions was directed entirely against the defendant personally, with the object of compelling him to appear and answer the plaintiff's claim. Thus the defendant might be attached by gage and pledges to appear in a personal action, and then distrained by all his lands and chattels continually until he appeared; he might moreover be arrested in trespass *vi et armis* at common law; and in actions of account, debt, detinue and on the case by statute. But before the year 1832¹⁰, the plaintiff in a personal action could never obtain final judgment against the defendant in default of appearance. If the defendant absconded, the plaintiff's only remedy was to proceed against him by distress infinite to compel his appearance, or to pursue him to outlawry in actions wherein his person might be arrested¹¹.

In English law then a real action is essentially an action for restitution—an action, wherein a right might be specifically enforced by process of execution *in rem* (meaning 'against a thing'). Incidentally, however, as we have seen from Bracton, a real action becomes an action to recover possession of land, or for the specific enforcement of a right exercisable over or in respect of land. The reason given for this appears to be that, if a man sued for the recovery of land, he might obtain restitution of the very thing he claimed; but if he sued for the recovery of moveable goods, he could not enforce restitution by any process of law, as the defendant might absolve himself by

¹ Glanvil, I. xii, xiii.² *Ib.*, I. xxi.³ *Ib.*, I. xxxi.⁴ *Ib.*, I. xvi, xvii.⁵ *Ib.*, II. iii, iv.⁶ *Ib.*, II. xix, xx.⁷ *Ib.*, XIII. 7-9.⁸ *Ib.*, IV. iii-vi, ix.⁹ *Ib.*, XIII. xxxii-xxxix.¹⁰ See Stat. 2 Will. IV. c. 39, § 16.¹¹ Bracton, fol. 439 b-441 a; Britton, lib. i. ch. xxvii. §§ 1-5, 12, fol. 49 b-51 a, 52 b; Finch, L. ch. xxvi; 3 Black. Comm. 280, 281; 1 Tidd's Practice, 109-112, 128-130, 9th ed.

paying the value of the goods in money¹. It may be interesting to inquire how far this reason holds good. Let us examine the actions classed as personal. We find first that all actions founded on a trespass in the wide sense of a violation of right, whether by breach of contract or independently of contract, are said to sound only in damages or result in pecuniary compensation to the injured party². Such actions are properly described as personal, according to the Roman as well as the English notion of a personal action. For they are founded on a personal duty of the defendant arising from contract or tort to make some satisfaction to the plaintiff, and are brought to obtain compensation only. There were however three actions given by the common law which appear to be brought to obtain restitution rather than compensation and are yet called personal. These are debt to recover a specific sum of money due, detinue to recover a chattel unlawfully detained, and replevin, whereby chattels unlawfully taken might be recovered. As to debt, the original writ given in Glanvil is in exactly the same form as the writ of right in the King's Court: 'Rex vicecomiti salutem: Praecepit N. quod juste et sine dilatione reddat R. centum marcas, quas ei debet, ut dicit, et unde queritur quod ipse ei injuste deforciat. Et nisi fecerit, summone eum,' &c.³ And it appears that in Glanvil's time a writ for unlawfully detaining a chattel lent for use would have been in the same form⁴. The origin of the later law however appears in Glanvil; for it is laid down that when a chattel has been lent for use, and the loan has come to an end, the borrower is bound to restore the chattel, if it be in existence, in as good a condition as he received it; and if the chattel has perished or been lost while in the borrower's custody, at all events he will be bound to pay the reasonable value thereof⁵. Thus the physical difference between immoveable and indestructible land and perishable goods appears to have prompted the rule laid down in Bracton's time, that in actions for the recovery of moveable chattels, the plaintiff was bound to name the value of the goods sued for, on payment of which the defendant would be absolved⁶. Bracton, accordingly, distinguishing compensation from restitution, classes actions for the recovery of goods as personal. As we have seen, he classes as personal upon the same ground actions for the recovery of chattels, wherein the defendant might be absolved by rendering the quantity demanded of articles of the same kind as those sued for; as in the case of an action for a certain sum of money⁷. The established

¹ See ante, p. 399.³ Glanvil, lib. x. cap. 2.⁶ See ante, p. 399.² Bac. Abr. tit. Damages, Trespass.⁴ Ib., cap. 13.⁷ See ante, p. 399.

form of the writ of debt, which we find in Latin in the Register¹, and in English in Blackstone², differs slightly from that given in Glanvil. Instead of 'centum marcas, quas ei debet, ut dicit, et unde queritur quod ipse ei deforciat,' we have 'centum solidos, quos ei debet et injuste detinet.' In the Register debt and detinue appear as different forms of the same action, and it is laid down that in a writ for chattels it is never said 'quae ei debet' but only 'quae ei injuste detinet': whilst in a writ in the King's Court for a debt it is said 'quos vel quas ei debet et injuste detinet.' If debt were brought by or against a person not a party to the contract, as an executor or administrator, the writ ran 'quos vel quas ei injuste detinet' without the 'debet.' We also observe that in all the writs for chattels given in the Register a pecuniary value is set upon the articles sued for³. It was moreover established that in actions for the recovery of chattels, whether in debt or detinue, judgment should be conditional, viz. that the plaintiff should recover the chattels sued for, or their value, if they could not be had⁴. In debt, to recover a sum of money the established form of judgment was that the plaintiff should recover his debt together with his damages and costs⁵. As the essence of the recovery of a debt is in the recovery of the amount due, and not in the specific restitution of certain coins, the action of debt, according to the test applied in English law, appears rightly placed in the class of personal actions. Tried by the same test, detinue is also properly described as a personal action; for damages only could be recovered with a certainty therein. We may here take the law from Blackstone:

'In detinue after judgment, the plaintiff shall have a *distringas* to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages, which (being either so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels) if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election, to deliver the goods, or their value: an imperfection in the law, that results from the nature of personal property, which is

¹ Reg. 139 b.² 3 Black. Comm. Appendix, No. III.³ Reg. 139; see Tidd's Practical Forms, 20.⁴ See Com. Dig. tit. Pleader, 2 W. 52, 2 X. 12; Tidd's Practical Forms, 340.⁵ Tidd's Practice, 931, 9th ed.; Tidd's Practical Forms, 338.

easily concealed or conveyed out of the reach of justice and not always amenable to the magistrate¹.

We now come to consider replevin. This is certainly a difficult case. The *action* of replevin is purely personal; for it is brought to recover damages for unlawfully taking chattels². But in consequence of the writ of replevin or plaint to the sheriff, which was the first step in the action, the chattels themselves were redelivered to the plaintiff before the action was tried. So that a successful plaintiff in replevin practically obtains restitution as well as compensation. But when we come to examine the process in replevin, we find several circumstances to distinguish it from a real action. First, replevin is entirely founded on the personal trespass of unlawfully taking the chattels³, and the title to the chattels taken cannot be tried thereby. For if the defendant claimed the chattels taken as his own, that put an end to the sheriff's jurisdiction to cause the chattels to be replevied, i. e. to be restored to the plaintiff on his giving security for prosecuting his claim. If the defendant made a claim of property, the plaintiff's course was to obtain a writ *de proprietate probanda*, in pursuance of which the sheriff must have proceeded to hold an inquest upon the question of the ownership of the goods. If by the sheriff's inquest the defendant were found to be the owner, the plaintiff could not obtain restitution of the chattels, but he might nevertheless bring detinue against the defendant. Secondly, restitution could not be obtained with certainty. For if the chattels were eloiigned or carried away out of the sheriff's jurisdiction, the law gave no further process against the goods themselves. In such a case the plaintiff's only remedy was to proceed against the defendant personally by causing his goods to be taken in withernam. And if the defendant had no goods that could be taken in withernam, the plaintiff's only course was to proceed against him by *capias* and process of outlawry⁴. In replevin therefore, as well as in detinue, the difference is clearly marked between the process given by the common law in actions for the restitution of moveable goods and the process in actions for the recovery of land. Chattels could be recovered with no more certainty in replevin than in detinue; in each case the only sure remedy is compensation, for chattels may always perish or be destroyed or removed out of the jurisdiction. For these reasons and on account of the absence of any process of execution by which the return of goods could be absolutely insured, the two actions given by English law, in which the restitution of chattels *might* be

¹ 3 Black. Comm. 413.

² See 1 Tidd's Practice, 5, 9th ed.

³ See Mirror, cap. ii. § 26; *Eaton v. Southby*, Willcs 131, 134.

⁴ F. N. B. 74 C. D; Gilbert on Distress and Replevin, 108, 110, 115, 4th ed.

obtained, were classed among personal actions; and, according to the principles which determined the distinction of actions made in English law¹, they appear to have been rightly so classified.

It appears then that in English law actions were classified as real or personal upon entirely different grounds from those which distinguished the Roman *actiones in rem vel in personam*. In English law the notions associated with the term *real action* are first, that of specific restitution to be enforced by process against the very thing demanded, and secondly, that of the recovery of land, because land only was specifically recoverable. With personal actions in English law is associated the idea of compensation or damages to be enforced by process against the person only. Having seen then what sense the terms *real* and *personal* convey when applied to actions, it may not be out of place to consider their meaning as applied to property. The history of the application of these terms to property appears to be this:—First, actions were said to be or to sound *in the realty* or *in the personalty*, according to the nature of the relief afforded therein. Next, the terms *the realty*, *the personalty* were applied to the things recoverable in real or personal actions respectively. Such things were then distinguished as real or personal things. And the division of things into real or personal things appears to coincide exactly with the classification of property as real or personal. In support of this the following authorities are quoted.

The expressions ‘the realty, the personalty’ occur in the passage already cited from Littleton². Coke comments thereon³:—‘*Tenant for life*: And so it is if it be brought against tenant for years, because it agreeth with the reason of Littleton, viz. that the place wasted shall be recovered, and therefore soundeth in the realty. *Also in the personalty, because treble damages shall be recovered*, which do sound in the personalty.’

Litt., sect. 500: ‘Also, if a man sue an appeal of felony of the death of his ancestor against another, though the appellant release to the defendant all manner of actions real and personal, this shall not aid the defendant, for that this appeal is not an action real, inasmuch as the appellant shall not recover any realty in such appeal . . .’

Litt., sect. 503: ‘Also if a man be outlawed in an action personall by processe upon the originall and bringeth a writ of error, if he at whose suit he was outlawed will pleade against him a release of all manner of actions personals, this seemeth no plea; for by the said action he shall recover nothing in the personallie, but only to reverse the outlawrie; but a release of the writ of error is a good plea.’ Coke thereon (Co. Litt. 288 b): ‘*For by the said action he shall recover nothing in the personallie*. Hereupon is

¹ See ante, p. 398.

² Sect. 492, ante, p. 394.

³ Co. Litt. 235 a.

to be observed a diversity, when by the writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like; for then by the reason that Littleton here yeeldeth, the release of all actions personals is a good plea, for that the plaintiff is to recover, or to be restored to something in the personalty. And so likewise when land is to be recovered, or to be restored in a writ of error, a release of all actions reals is a good barre. But where by a writ of error the plaintiff shall not be restored to any personall or real thing, then a release of all actions real or personall is no barre, and therefore Littleton here putteth his case with great caution.' 'And so note that an action real or personall doth imply a recovery of something in the realty or personalty, or a restitution to the same, but a writ¹ implyeth neither of them, which is worthy of observation².'

Littleton, sections 496, 497: 'Also, in such case where a man may enter into lands or tenements, and also may have an action real for this, which is given by the law against the tenant; if in this case the demandant releaseth to the tenant all manner of actions reals, yet this shall not take the demandant from his entrie, but the demandant may well enter notwithstanding such release, for that nothing is released but the action, &c. In the same manner is it of things personall; as if a man by wrong take away my goods, if I release to him all actions personals, yet I may by the law take my goods out of his possession.'

Co. Litt. 118 b: '*Goods, biens, bona*, includes all chattels, as well real as personall. *Chattels* is a French word, and signifies goods, which by a word of art we call *catalla*. Now goods, or chattels, are either personall or reall. Personall, as horse and other beasts, household stuffe, bowes, weapons, and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions. Reall, because they concern the realty as tearmes for years of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by *elegit*, and such like.'

Co. Litt. 19 b, 20 a: '*Tenements, teumentia*. This is the only word which the said statute of W. 2, that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure, therefore all these without question may be entailed. As rents, estovers, commons, or other profits whatsoever granted out of land; or uses, offices, dignities, which concern lands or certaine places, may be entailed within the said statute, because all these savour of the realtie. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be entailed, because they savour nothing of the realtie.' In two

¹ Sc. of error.

² Co. Litt. 289 a.

passages¹ moreover Lord Coke speaks of hereditaments as being real, personal or mixed.

It appears from the above quotations that the term 'the realty' was used to express the capability of restitution in the abstract, or else to denote things capable of restitution, i. e. lands and tenements. And it is worthy of note that chattels real are chattel interests in land capable of specific restitution, as the interests of tenants by statute merchant, statute staple and *elegit*, who were said to hold *ut liberum tenementum*, and might by statute have an assise, if ousted², or of tenants for years, who might in Lord Coke's time recover possession, if ousted, by the action of ejectment³. Blackstone in effect defines things real as those which are physically immoveable, and things personal as those which are physically moveable⁴. But the authorities cited in the course of this article tend rather to show that things real are things recoverable in the realty, i. e. specifically by process of execution dealing directly with the object of the right violated: while things personal are things recoverable in the personality, i. e. by action and process of execution *in personam*.

If the explanation stopped here, it might be supposed that the classification of property as real or personal coincided with the division of property into immoveable or moveable. Unfortunately, in modern times at least, the matter is by no means so simple. In the early days of the common law it was otherwise. Free tenements were then well-nigh the only things specifically recoverable in the King's Court; all that could be included in 'the realty.' And, as we have seen, the physical difference between immoveable land or tenements and moveable articles or chattels was at the bottom of Bracton's test for the classification of actions. But to the physical difference between tenements and chattels, there was added the distinction in the mode of succession after death, that the former descended to the heir, the latter passed to the executor⁵. In consequence of this, the notion of descent to the heir became associated with the realty, as well the idea of specific restitution: while the incident of passing to the executor became a characteristic of the personality. This might appear to emphasise, not to obscure the distinction between real and personal things, were it not that certain interests in land, not coinciding with the idea of free tenements, were classed with chattels, and so came to pass to a man's executor along with his other chattels. Hence it comes that we have chattels real; interests in land, specifically recoverable, but passing to the executor, not to the heir; of which terms of years

¹ Co. Litt. 1 b. 6 a.

² See 3 Black. Comm. 199.

³ See Glanvil, lib. vii. cap. iii. 5-8; Bracton, lib. ii. cap. xxvi. xxix, fol. 60, 62 b.

⁴ Co. Litt. 43 b.

⁵ 2 Black. Comm. 16.

are now the most important. Further, to complicate the matter, there may be a thing which descends to the heir, a hereditament, which is but a personal thing, as being recoverable in the personality only. In Year Book, 4 Edw. IV. 83, pl. 38, an annuity granted to a prior and his successors, and not charged on any land, was described as a personal thing, in which the grantee might have an inheritance. So that if one would endeavour to understand approximately the classification of property made in English law, he must proceed by steps such as are indicated in the following table.

Property = the sum of the *things* a man has, which are valuable in money. In other words, all the rights he has, which are capable of being exchanged for the ownership of money¹.

Things are

- (a) corporeal, i. e. tangible objects, as land, gold, garments, &c.
- (b) incorporeal, i. e. intangible; legal relations and rights, as an inheritance, advowsons, obligations and rights of action².

Things are also

- (a) real, i. e. recoverable in the realty or specifically, as lands and tenements descending to the heir.
- (b) personal, i. e. recoverable in the personality. Things personal are chattels, which generally go to the executor: but there are things personal which go to the heir.

Chattels are

- (a) chattels real, or chattel interests in land; interests in land which are specifically recoverable, but go to the executor not the heir.
- (b) chattels personal.

Chattels personal are

- (a) things in possession = tangible moveable things, of which their owner has actual possession and enjoyment.
- (b) things in action = things to recover or realize which, if wrongfully withheld, an action must be brought; things in respect of which a man has no actual possession or enjoyment, but a mere right enforceable by action.

Real property then = things recoverable specifically, and descending to the heir
= real hereditaments, corporeal or incorporeal.

Personal property = things recoverable in the personality.
= chattels, real as well as personal, including personal hereditaments.

T. CYPRIAN WILLIAMS.

¹ See Savigny, *System des heutigen römischen Rechts*, vol. i. § 53, pp. 338-340.

² Bracton, lib. ii. cap. iv, § 2, fol. 10 b.

THE SWISS FEDERAL COURT. I.

WE hear much nowadays about Home Rule and Imperial Federation. Each has its supporters and its opponents, both of whom agree, however, on two very important points:—

(1) That the rights and powers of each party to the contract or alliance (that is, the relation of the supreme or central government to the governments of the members of the league) must be set forth, with more or less precision, in a written document, which is commonly known as a Constitution.

(2) That provision must be made for determining, otherwise than by war, disputes arising as to the exact meaning of any clauses of the Constitution, and, in any special case, whether they have been violated or not.

In other words, there must be some sort of a court to interpret the written Constitution. Now, is this court to be identical with, or independent of, the Legislature of the Supreme or Federal Government? Is the entire separation of the legislative and the judicial functions of government possible in this particular case; and if it is possible, is it desirable? The common objection to such a court, and the true answer to it, are thus stated in No. 78 of the 'Federalist,' which is due to the pen of Alexander Hamilton:—

'Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. . . . There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. . . . If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be recollected from any particular provisions in the Constitution. . . . The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and vali-

dity ought, of course, to be preferred: in other words, the Constitution ought to be preferred to the statute. . . . Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in their Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.'

Attempts to create such courts, and to define their powers with regard to the supreme and non-supreme governments in the league or alliance, have been made most frequently and successfully in the case of federations. The three best-known cases are those of the United States of America, of the German Empire (which is, strictly speaking, a confederation of which kings are members, and whose head, holding his office for life, is therefore styled Emperor), and of Switzerland. In each case we shall find, on closer examination, that the weaker the central government the greater the tendency to cut short the jurisdiction of the supreme court in favour of the legislature: whereas the stronger the federal government the more independent and advantageous is the position of the court.

The object of this paper is to describe the Swiss Federal Court, and hence not much will be said on the two others.

The Supreme Court of the United States of America is commonly regarded as the most perfect instance of a court exercising the office of guardian of the Constitution. It must be remembered, however, that it came into existence in 1787 only under the second American Constitution. Under the first, 'the Articles of Confederation' (1778), we read these words (Art. IX.):—

'The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever: which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress' is, by a very complicated system of selection and lot, to appoint commissioners. . . . 'All controversies concerning the private right of soil, claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the

States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.'

Thus in 1778 the Supreme Court consisted of judges appointed directly by Congress, and dependent on it, or by its indirect action.

By the Constitution of 1787 a central executive was appointed, the central Legislature made a real Legislature, and not a mere meeting of envoys, and a proper Supreme Court was set up.

The provisions as to the latter are contained in Article III:

'1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.'

[By Article II. 2 it is provided that the President 'shall nominate, and by and with the advice and consent of the Senate shall appoint . . . judges of the Supreme Court.']

'2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

'In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before-mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.'

The Eleventh Amendment to the Constitution runs as follows:—

'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'

By the Judiciary Act of 1789 a number of circuit and district

United States Courts were erected, from all of which an appeal lies to the Supreme Court.

As there is no appeal from the Supreme Court, and as it has well-defined functions with regard to disputes between the Federal Government and any State, while it is quite distinct from, and independent of, the Legislature, this Court seems to have realised the ideal set forth in the words of Hamilton quoted above, for it is both the guardian and interpreter of the Federal Constitution.

The German Imperial Court is far inferior in every way to the American Supreme Court or to the Swiss Federal Court.

In the Federal German Constitution of April 16, 1871, we find that by Article 4 (13) power is given to the Federal Diet to make Federal laws as to obligations, a penal code, trade and exchange law, and judicial procedure. It is provided by Article 75 that cases of high treason or rebellion and the like shall be referred, in the first and last resort, to the Upper Court of Appeal of the three Hanse towns, sitting in Lübeck; and by Article 76, that matters relating to public law in dispute between members of the Federation, and constitutional disputes arising in the case of such members of the Federation as have not a special court or authority to decide such matters, *may*, on the demand of one of the parties, be referred to the Federal Executive or Bundesrath, in the one case to be decided by it, in the other that some compromise may be found or special Federal law passed on the subject. By Article 7 the Federal Council is charged with the execution of Federal laws.

Thus, while the Federation could pass laws on certain subjects, there was no Federal Court to decide in disputed cases, save one, the most important set of questions relating to constitutional matters being left to the Executive.

A Federal law as to justice was passed on April 11, 1877. By this a Federal or Imperial Court (Reichsgericht) was erected, and fixed at Leipzig. It was divided into civil and criminal sides, the Imperial Chancellor determining the number of judges in each. In civil matters it took the place of the Upper Court of Commerce erected by Federal law of June 12, 1869; in criminal, of the above-mentioned Court of the Hanse towns. (It does not seem clear, however, how a Federal law could abrogate an article of the Federal Constitution.)

The jurisdiction of this Court as settled by the law erecting it and by later Federal laws is as follows:—

1. *Civil side.*

It entertains appeals

- a. Against decisions of Imperial consuls and their respective consular courts.

- β. Against final decisions of the Supreme Courts of the States composing the Federation¹; but only as regards the provisions of an Imperial law which is in force without as well as within the area subject to the Court from the judgment of which the appeal is made. Further, the Federal Council or the Emperor may determine that the infringement of such a law does not warrant an appeal, or that that of a law of less general application does warrant an appeal.
 - γ. Against decisions of courts with jurisdiction in special departments, *provided* the State in which they are proposes the appeal, that the Federal Council approve this course, and that the Emperor issues a decree to that effect².
 - δ. Each State in the Confederation *may* refer to the Imperial Court all civil suits pending on October 1, 1879, and hitherto in the jurisdiction of the Supreme local Court³.
2. *Criminal side.*
- a. High treason against the Emperor or the Empire.
 - β. Appeals against decisions of consular courts.
 - γ. " " verdicts of juries.
 - δ. " " judgments given by local criminal courts which are courts of first instance, *if* the remedies given are not exclusively based on provisions contained in the laws of that particular State.
 - ε. Offences against regulations respecting the collection of taxes payable to the Imperial Treasury, *if* the pleadings are officially submitted to the Court by the State officials.
3. *Miscellaneous.*
- a. Patent cases (Federal law of June 16, 1879).
 - β. Certain disciplinary cases (same law).
 - γ. Constitutional disputes between the senate and citizens of Hamburg (Federal law of March 14, 1881).

It will be seen from this that the jurisdiction of the Court is mainly permissive, its powers in cases of high treason, jury appeals, and consular appeals alone giving it any claim to be called a Federal or Imperial Court. In the German Empire, the Executive all but absorbs both the Legislative and Judiciary⁴.

¹ There is a provision that any member of the Federation, in which there are many Supreme Courts, may erect a Final Court of Appeal to have jurisdiction in all cases save those formerly belonging to the Upper Court of Commerce, or given to the Imperial Court by special Federal legislation. Bavaria is as yet the only state which has availed itself of this provision, and has set up a Final Court at Munich by a law of Feb. 23, 1879.

² Of this clause Prussia, Hesse, Waldeck, and several of the minor German states have availed themselves, as appears from the Imperial decrees of Sept. 26, 1879.

³ This clause has been taken advantage of by Prussia, Baden, Oldenburg, Waldeck, the three Hanse towns, and two minor German states.

⁴ The above statements are based on the Federal Constitution, and on the very brief account of the Court contained at pp. 60, 179-81, 183, of Professor Paul Laband's

The Swiss Federal Court, at least in its present form, which dates from 1874, holds the mean between the Supreme Court of the United States and that of the German Empire. While not equal to the former, particularly in the matter of exclusive jurisdiction in the interpretation of the Constitution, it is in this point far superior to the latter. It has been much improved since it was originally set up in 1848, and will doubtless, with the decay of unreasonable jealousy of the central government on the part of the cantons, approach more and more closely the Supreme Court of the United States, of which it is an avowed copy, so far as Swiss political feeling allowed in 1848. Its exact constitution and jurisdiction are probably less known than those of its American and German compeers. For this reason, and because it has to settle disputes (unlike the two others) between four distinct nationalities, each speaking its own language (German, French, Italian, and Romansch), it may be worth while to take some trouble in order to gain an idea of what it is and of what it does. It is the product (though not the final result) of an historical development extending over nearly 600 years; and if it is desirable, in order to understand Swiss political and constitutional matters, that we should study their history with great care, this is essential in the case of the Federal Court, for history only will explain the exact meaning of the carefully balanced and guarded phrases which describe its jurisdiction. Fortunately for foreigners that history has been already written more than once. My chief authorities in the following sketch, both on the historical and legal sides, are the works of J. J. Blumer and J. Dubs. To Blumer, of Glarus, above all other men, the Federal Court owes its existence. He took the largest share in drafting the provisions regarding it in 1848, and he was uninterruptedly a member of it from 1848 to his death in 1875, being the first president of the Court as strengthened under the 1874 Constitution. Hence his *Handbuch des Schweizerischen Bundesstaatsrechtes* (1863-4, 2 vols.) was an authoritative exposition of the principles of the Federal Constitution, based on the fullest knowledge and the most exhaustive researches, so that it is by far the best and most thorough work yet produced on the Swiss Constitution. After his death (Nov. 12, 1875) a thorough revision of the work was undertaken (Blumer himself having already made some progress with it) by J. Morel, another member of the Federal Court. This new edition is of course based on the Constitution of 1874. It appeared in three volumes between 1877 and 1887, and

Das Staatsrecht des Deutschen Reiches, in vol. ii. part 1 (1883) of H. Marquardsen's *Handbuch des Oeffentlichen Rechts der Gegenwart in Monographien* (Mohr: Freiburg i. B. and Tübingen).

is the one I have used; the section on the Federal Court may be found in vol. iii. pp. 131-217. Less bulky, and written in a more popular style than Blumer's work, is *Das Öffentliche Recht der Schweizerischen Eidgenossenschaft* (1878, 2 vols.), by Jakob Dubs, of Zürich, who was a member of one or other House of the Federal Assembly from 1848 to 1875, and became a member of the Federal Court in 1876, holding this post till his death on Jan. 13, 1879. This work is very brightly and vigorously written, and is, next to Blumer's, the best book on the subject. The section on the Federal Court is in vol. ii. pp. 72-102. A painstaking compilation from Blumer and Dubs is the work by A. von Orelli, *Das Staatsrecht der Schweizerischen Eidgenossenschaft* (1885), one division (vol. iv. 1) of Marquardsen's great *Handbuch des Öffentlichen Rechts der Gegenwart in Monographien*. This is brought up to date, and the matter is very clearly arranged; but it does not pretend to any originality. For the Federal Court, see pp. 38-44. Two other works supply useful hints from time to time, but are now antiquated, as they both treat of the Constitution of 1848 only—J. Meyer's *Geschichte des Schweizerischen Bundesrechts* (1875-8, 2 vols.; there is a short supplement on the 1874 Constitution), and J. Rüttimann's *Das Nordamerikanische Bundesstaatsrecht verglichen mit den politischen Einrichtungen der Schweiz* (1867-1876, 3 vols.). Finally I must mention J. C. Bluntschli's *Geschichte des Schweizerischen Bundesrechtes* (second edition of vol. i. in 1875), which requires to be used with great care in the earlier portion, is very valuable indeed between 1315 and 1798, and then becomes rather sketchy; and R. E. Ullmer's *Die Staatsrechtliche Praxis der Schweizerischen Bundesbehörden* (1862-1866, 2 vols.), which gives the Federal case law from 1848 to 1863.

Such are the main authorities on Swiss constitutional matters, Blumer, followed by Dubs, being by far the most weighty and important. We must now trace out the steps by which the Federal Court came into existence, for otherwise we cannot fully grasp its present character as but one link—and that not the last one—in a long chain. Before 1848, we may distinguish, with Dubs, two methods adopted for peaceably settling disputes among members of the confederation,—*friendly remonstrances and arbitration*. It must be always borne in mind that from 1291, the date of the origin of the Confederation, down to 1848 there did not exist (save from 1798-1803 in the time of the Helvetic Republic) any central or Federal authorities, whether legislative, executive, or judicial, each member of the Confederation being a sovereign state and entering the alliance for certain very definite purpose. In fact, till 1848 the Confederation was a 'Staatenbund,' and not a 'Bundesstaat.'

(1) *Friendly remonstrance* ('Minne').

This is the plan adopted in the two earliest treaties of alliance, those of 1291 and 1315. The document of 1291 says: 'Si vero dissensio suborta fuerit inter aliquos conspiratos, prudentiores de conspiratis accedere debent ad sopiendam discordiam inter partes, prout ipsis videbitur expedire, et quae pars illam respueret ordinationem, alii contrarii deberent fore conspirati. . . . Si vero guerra vel discordia inter aliquos de conspiratis suborta fuerit, si pars una litigantium iustitiae vel satisfactionis non curat recipere complementum, reliquam defendere tenentur conjurati'; and that of 1315, in its racy German: 'Were ouch daz, daz sich dekein Missehelli oder dekein Krieg huebe oder uffstuende under dien eitgenozen, dar zuo suln die besten und die witzegesten komen, und sulen den Krieg und die Misseheli slichten und hinlegen nach minnen oder nach rechte. Und sweder teil das verspreche, so sulen die andern eitgenoze dem andern minnen older rechtes beholfen sin uf iens schaden, der da ungehorsam ist. Wurde ouch dekein Stoz oder dikein Krieg zwischen dien Lendern, und ir eines von dem andern weder minne noch recht nemen wolde, so sol daz dritte Lant daz gehorsame schirmen und minnen und rechtes beholfen sin.' It must be remembered that in both cases there were only three parties to the treaty—Uri, Schwyz, and Unterwalden, and that the object was to settle disputes between neighbours in a friendly and informal way. The 'witan,' or wise men, are to meet together and to heal the quarrel according to the rules of equity and right. If either party refuse to accept their decision, the other confederates are to enforce obedience. If war arises between two members, and one will not accept from the other what is equitable and right, the third ally is bound to support that one which does accept such offer in its endeavours to obtain what is due to it.

(2) *Arbitration* ('Schiedsrichter').

This first appears in 1351, when the great Imperial Free City of Zürich condescended with many reservations to join the 'Everlasting League.' It became more common as the number of the Confederates increased, and was the method employed when friendly remonstrances failed, and when war was not yet declared. The arrangements as to the place of meeting, the number and the method of choosing the arbitrators, and other details varied according to the stipulations contained in the different treaties by which each state had been admitted into the Confederation. Dubs thinks that the appointment of an umpire, to decide when the arbitrators could not agree, was the key-stone of the whole system: he was sometimes chosen by the arbitrators (e. g. in 1351), sometimes by the parties themselves (e. g. 1353), sometimes by other members of the con-

federation. The whole process of such arbitration between one Confederate and another was known as 'eidgenössisches Recht,' though it must not be supposed that this had any reference to any collection of Federal laws, customs, or other regulations. It signified only the method by which the other Confederates tried to reconcile with one another those of their allies who were engaged in a dispute. Their jurisdiction was purely voluntary, not coercive: when arms were resorted to matters had passed beyond arbitration. Bluntschli (i. cap. 25) gives an interesting and curious account of all the recorded cases of Federal intervention from 1404 to 1781. Roughly speaking, we may say that arbitration was the only method employed from 1351 to 1798 of settling disputes between members of the confederation otherwise than by force of arms—in short, the only approach to a strictly judicial investigation of their quarrels.

When the intricate political system of the Swiss Confederation (or as it called itself, 'the ancient league of Upper Germany') came to an end in 1798, the Helvetic Republic was set up. According to the new Constitution there was a central Executive, Legislature, and Judiciary, but not of a Federal character, since the Republic was organised in the most centralised way, and the 'cantons' (the word, informally used in the fifteenth century, is now first used officially) were mere administrative districts directly under the control of the central government.

The Supreme Court of the Helvetic Republic (Constitution, title vii) consisted of a member (and an assistant) nominated by each canton (nineteen in number), one-fourth part being renewed annually. It had original jurisdiction over the members of the Executive and of the Legislature, and in criminal cases involving the penalty of death, or of imprisonment or banishment in either case for ten years at least. It acted as a court of appeal in civil matters, when the decisions of the inferior courts were invalid by reason of want of jurisdiction, whether through informality or violation of the Constitution.

A new Swiss Constitution was set up in 1803 by Napoleon's Act of Mediation, the name 'Switzerland' being now first employed as the official designation of the Confederation. In this new system there was no distinct Federal Executive, and the Diet was made up of delegates (two from each of the nineteen cantons) voting according to instructions. The provisions as to the settlement of disputes between the cantons are contained in two articles:—

xxxvi. La Diète prononce sur les contestations, qui surviennent entre les cantons, si elles n'ont pas été terminées par la voie de l'arbitrage. A cet effet, elle se forme en syndicat à la fin de ses

travaux ordinaires, mais alors chaque député a une voix, et il ne peut lui être donné des instructions à cet égard.

xxi. Si durant de la vacance de la Diète, il s'élève des contestations entre deux ou plusieurs cantons, on s'adresse au landammann de la Suisse [the chief ruler of that one of the six cantons in which the management of Federal affairs was vested, shifting annually], qui, selon les circonstances plus ou moins pressantes, nomme des arbitres conciliateurs, ou ajourne la discussion à la prochaine Diète.

Thus the Court of 1798, when the Federal element for a time disappeared from Switzerland, and the Diet (after the failure of arbitration) under the Constitution of 1803, are the first attempts to transfer the decision of inter-cantonal disputes to a regular tribunal capable of enforcing its decisions in these cases, as in any other. With the partial restoration by the Constitution of 1815 of things in Switzerland to the *status quo ante* 1798, came naturally the restoration of the 'Arbitration' system, the old 'eidgenössisches Recht,' with reference to which the most elaborate regulations were laid down in article 5 of the new Constitution. These were to the following effect. Each of the cantons engaged in the dispute was to choose one or two arbitrators from among the magistrates of the other cantons outside the dispute. These arbitrators were to try to settle the matter by friendly remonstrances (*Minne*) and negotiations. If these failed, the arbitrators chose an umpire out of the magistrates of one of the cantons not engaged in the dispute, and which had not already supplied an arbitrator. (If quarrels arose as to the choice of an umpire, he was to be nominated by the Diet, the parties to the dispute not having votes at his election.) The umpire and arbitrators were to try to arrange the dispute by friendly negotiations, or by way of compromise, or, in the last resort, 'nach den Rechten,' that is, by a formal decision which, if need be, was to be enforced by the Diet. The umpire and arbitrators were, in order to secure complete impartiality, to be relieved, during their period of office, from their oaths to their respective cantons. Violent acts or armed interference were strictly forbidden to any of the cantons interested in the pending arbitration. The arbitration could only take place with reference to such matters as were not guaranteed by the Federal Pact.

This system was simply a codification of the practice prevailing before 1798, and legally subsisted till 1848. It suffered, however, from several defects, e.g. the uncertainty as to the precise subjects which could be laid before arbitrators, the course to pursue if a canton refused to name arbitrators at all, the lack of criminal or penal jurisdiction save in the case of soldiers, the expense and waste of energy through the necessity of creating a fresh court for

every case, want of guarantees for the impartiality of the arbitrators, the uncertainty as to procedure, the length of the proceedings, difficulties as to enforcement of the decisions, and the like. Hence, when after the Paris Revolution of July 1830, liberal ideas began to reassert themselves in Switzerland, it was natural that, after the cantonal constitutions were revised in a democratic sense, the Federal Constitution should be taken in hand. An attempt to revise it was made in 1832-3, but failed, partly owing to the resistance of the conservatives, who wished for no change, and partly through the radicals, who wished for far greater changes than were proposed. This draft is very interesting, for in it we find that, while the Diet was preserved, a Federal Executive and a Federal Court were to be set up, the latter with jurisdiction in certain defined civil and criminal cases. Historically the draft of 1833¹ (drawn up by Baumgartner) is most important, for it is a first recension of the Constitutions of 1848 and 1874. After the Sonderbund war of 1847, another attempt was made to revise the Federal Pact of 1815. This time the reformers were successful, the result being the Constitution of Sept. 12, 1848, which was accepted by 15½ cantons against 6½ (the three Forest cantons, Zug, Appenzell Inner Rhoden, Ticino, and Valais). Its framers—Druey of Vaud and Kern of Thurgau—worked on the lines of the draft of 1833. The Diet was replaced by a Federal Legislature of two Houses (one—Stände Rath, or House of States—in which each canton was represented by two deputies, elected by that canton, and another—National Rath or House of Representatives—in which the number of representatives varied—now 145—according to population, one member to every 20,000 souls or fraction over 10,000, being elected by popular vote). A Federal Council, or Bundesrath, of seven members elected by the Federal Legislature, was entrusted with the executive power, and, by common consent, a Federal Court created with jurisdiction in civil and criminal causes very much as in 1833, but having also a limited jurisdiction in cases where rights guaranteed by the Constitution were alleged to have been infringed, *provided* that the Federal Legislature referred such cases to it². This was a great step in advance³. Another attempt at

¹ The clauses of the 1833 draft referring to the Court (in both recensions) will be found pp. 739-42, vol. ii. (Bern, 1876) of *Repertorium der Abschiede der eidgenössischen Tagsatzungen aus den Jahren 1814 bis 1848*: bearbeitet von Wilhelm Fetscherin. The terms 'first' and 'second recension,' sometimes used hereinafter, refer to the drafts prepared by two committees appointed by the Diet, the one on July 17, 1832, the other on March 19, 1833. The draft of the latter was altered before it was discussed by the Diet, May 13-15, 1833.

² Various provisions were also made as to the Court by the Federal law of June 5, 1849. It will be found in vol. i. pp. 65-86 of *Offizielle Sammlung der das Schweizerische Staatsrecht betreffenden Actenstücke, Bundesgesetze, Verträge und Verordnungen seit 12 Sept. 1848* (Bern, 1840).

³ The revision of 1866 did not affect the Constitution of the Federal Government.

revision was made in 1872 in the direction of still further strengthening the Federal authorities at the expense (naturally) of those of the cantons, but the mistake was made of lumping reforms which every one desired with others asked for by a certain number of persons only. Hence it was rejected (May 12, 1872) by 13 cantons to 9, and by 260,859 votes to 255,606. The majority consisted of the Roman Catholic and non-German-speaking cantons. In this draft, the jurisdiction of the Federal Court as to civil and criminal cases was pretty much the same as that of the existing (1848) Constitution (perhaps rather more in civil cases), but its functions as an interpreter and upholder of rights guaranteed by the Federal and cantonal constitutions were very much extended¹. The next attempt at revision was more successful as it resulted in the existing Constitution, which was accepted May 29, 1874, by 14½ to 7½ cantons (the division as in 1848, save that in 1874 Lucerne and Freiburg were in the minority, Ticino in the majority), and 340,199 votes to 198,013.

By this constitution the Executive and Legislature remained as in 1848 and 1872, while the jurisdiction of the Federal Court in criminal and civil causes remained as in 1872 (though that in civil causes has been greatly extended by the increased number of Federal laws passed), as well as that in matters affecting the interpretation of the Federal or cantonal constitutions. Power was given to the Federal Legislature to settle by a special law matters of detail relating to the Federal Court, a power which was exercised in the Federal law made on June 27, 1874².

This law, together with the Constitution, affords a complete view of the present organisation and jurisdiction of the Federal Court, and will be frequently referred to hereinafter. But it is impossible to grasp the full significance of the 1874 settlement unless we see the way in which it was gradually arrived at (it is itself but a step towards a goal not yet attained), and hence it is necessary to give some account of the provisions of the previous attempts to set up a Federal Court. In order to keep always before the eyes of my readers the very important distinction between the drafts of 1833 and 1872, and the Constitutions of 1848 and 1874, I shall always place the former figures between brackets, leaving the latter without any such marks of distinction.

¹ The various drafts (as to the Court) made in Feb. 1872 by the National Rath and Stände Rath in the reports to their respective committees (appointed in 1871) will be found on pp. 568-570, 583, 586 of *Protokoll über die Verhandlungen des Schweizerischen Nationalrathes betreffend Revision der Bundesverfassung, 1871-2* (Bern, 1873), and the draft finally submitted to popular vote on pp. 636-8 of the same volume.

² See *Ämtliche Sammlung der Bundesgesetze und Verordnungen der Schweizerischen Eidgenossenschaft*, Neue Folge, i. 136-156 (Bern, 1872).

In considering the Federal Court, the subject falls into two main divisions:—

- I. Its organisation or constitution ;
- II. Its jurisdiction, whether civil, criminal, or constitutional¹.

I. Organisation of the Court.

(1) Number of Members.

(1833). Art. 87. Nine judges and four assistant judges.

1848. Art. 95. Eleven judges, with (according to the Federal law, Art. 1) eleven assistant judges²—the idea being to provide for the possibility of having a judge from each of the twenty-two cantons.

(1872). Art. 104. Left to Federal legislation.

1874. According to the Federal law, Art. 1, nine judges and nine assistant judges. The latter are called in the official texts of the Constitution, 'Ersatzmänner,' 'Suppléants' or 'Supplenti,' and are no doubt to sit in the place of the judges who are prevented for some reason from sitting in person.

(2) How elected.

(1833). Art. 88. Each canton is to propose two persons, one belonging to that canton, and the other belonging to some other canton: the Diet, out of these forty-four names, is to name the thirteen members of the Court, but no two judges are to belong to the same canton. Seats vacated during a term of office are to be filled up in the same way, but only for the remainder of the term.

¹ The articles, in the Constitutions and drafts, and the two great Federal laws, relating to the Federal Court, are as follows:

I. *Organisation*.—(1833), 87-96. 1848, 95-100, and Federal law of 1849, 1-7, 15-21, 43-6, 52-80. (1872), 103-6. 1874, 107-9, and Federal law of 1874, 1-26.

II. *Jurisdiction*.—(1) *In civil causes*—(1833), 97. 1848, 101-2, and Federal law of 1849, 47. (1872), 107-8. 1874, 110-1, and Federal law of 1874, 27-31. (2) *In criminal causes*—(1833), 98. 1848, 74 (7), 94, 103-4, and Federal law of 1849, 8-14, 22-42, 48-51. (1872), 81 (7), 103, 109. 1874, 87 (7), 106, 112, and Federal law of 1874, 32-55. (3) *In the interpretation of the Constitution*—(1833), none. 1848, 74 (16) (17), 90 (3), 105, and Federal law of 1849, 47. (1872), 81 (13), 99 (3), 110. (1874), 85 (12), 102 (3), 113, and Federal law of 1874, 56-63.

It may be well to state that Art. 106 of 1848 empowered the Federal Legislature to give to the Federal Court jurisdiction in cases other than those expressly mentioned in clauses 101, 104, 105 (i.e. civil and criminal cases). Art. 114 of 1874 repeats this, extends the power to all three branches of jurisdiction (Arts. 110, 112, 113), and adds that Federal legislation was to settle what powers were to be transferred to the Court to enable it to secure the uniform interpretation of future Federal laws. This last clause is the foundation of the appellate jurisdiction of the Court in civil matters; while it was by virtue of these two articles of the Constitution that the great Federal laws of June 5, 1849, and June 27, 1874, were enacted. Art. 114 of 1874 is precisely Art. 111 of (1872), which was the result of the second thoughts of the Stände Rath (*Protokoll*, 1871-2, pp. 570, 583, 586). The National Rath draft ran as follows: 'The Federal Court decides finally as a "court of cassation" in civil and criminal cases, on complaints relating to the infringement or wrongful interpretation of Federal laws or State treaties or concordats. A Federal law is to specify the cases in which such appeal is to be given, and also the procedure to be adopted in the matter of such appeals.'

² The Committee appointed August 16, 1847, to draft the Constitution had proposed 11 judges and 5 assistant judges; see its *Protokoll*, p. 138.

1848. Art. 96. Chosen by the Federal Legislature. Similar provision as to vacant seats.

(1872). Art. 104. Chosen by the Federal Legislature. Each of the three national languages is to be represented¹.

1874. Art. 107. As 1872 with (according to the Federal law, Art. 6) the 1848 provisions as to vacant seats, the election of course being made by the Federal Legislature.

(3) *Who can be elected members of the Court.*

(1833). Art. 89. Any one, save members of the Federal Executive or other Federal officials.

1848. Art. 97. Every Swiss citizen who can be elected a member of the National Rath or popular house of the Federal Legislature (that is, by Art. 64, all over twenty years of age, not excluded from the privileges of active citizenship by the legislation of the canton in which they reside, and not being clerics or members of the Federal Executive or officials elected by it, or of the Stände Rath²).

Members of the Federal Executive and officials elected by it cannot also be members of the Court. According to the Federal law of 1849 two relatives by blood or by marriage, whether in the ascending or descending line, or collaterals up to and including first cousins, or brothers married to two sisters, cannot at the same time be judges or assistant judges of the Court, nor hold any minor office connected with it. If any official by marriage comes within these prohibitions he *ipso facto* loses his office.

(1872). Art. 105. Qualifications as in 1848, save that limitation to laymen omitted in Art. 71.

Members of the Federal Executive or of the Federal Legislature and officials elected by either cannot at the same time be members of the Court. Other offices and callings may be declared by Federal legislation to be incompatible with a seat in the Court.

1874. Art. 108. Qualifications as in 1872, but restriction to laymen again inserted³.

¹ This latter clause was insisted on by the Stände Rath and finally adopted by the National Rath; *Protokoll*, 1871-2, pp. 568, 586.

² An attempt was made during the debates of the Committee of August 16, 1847, to throw open the election to every Swiss citizen having a right to vote. This was successful (*Protokoll*, p. 183), but, later, members of cantonal executive bodies were excluded (*ibid.*, p. 193), though this exclusion does not seem to occur in the final draft approved by the Committee (*Protokoll*, p. 200).

³ It must be remembered that, as each canton fixes, as it pleases, the method of election, the qualifications of the candidates, and length of service, in the case of the Stände Rath, clerics are not excluded from or included in that House by the Federal Constitution. As regards the National Rath, laymen only could be elected under the Constitution of 1848 (Art. 64), a proposal probably suggested by the religious troubles which largely caused the Sonderbund war of 1847 (Nov.), and adopted by the Committee of August 16, 1847, by 14 votes (see its *Protokoll*, p. 148). This distinction was omitted by the Committee of that House in 1871, and this decision was upheld by the House itself by 49 votes to 16 (*Protokoll*, 1871-2, p. 395). Art. 71 of the 1872 draft thus appearing without any limitation. In the revision of 1873-4, the National Rath Committee (*Protokoll*

Exclusions as in 1872. According to the Federal law of 1874, Art. 5, members of the Court may not be directors or on the council of administration of any industrial enterprise. Further, by the Constitution, members of the Court are forbidden to hold any other Federal or cantonal office, or to engage in the active practice of any profession or trade¹.

(4) *Term of office.*

(1833). First recension, Art. 94-5. Six years, but re-eligible. Second recension, Art. 90-1. Half the number hold office for three years and then retire, but are re-eligible.

(1848). Art. 96. Three years, a new election being necessary when the National Rath is re-elected.

(1872). Art. 104. Left to Federal legislation.

(1874). According to the Federal law, Art. 6, six years.

(5) *Presidency of the Court.*

(1833). Art. 93-4. President chosen by the Diet for three years (six years in the first recension, Art. 97) from among the members of the Court, but is re-eligible. Vice-President chosen by the Court from among its members.

(1848). Art. 98. President and Vice-President² chosen by the Diet every year from among the members of the Court.

(1872). Art. 104. Left to Federal legislation.

1874. According to the Federal law, Art. 7, President and Vice-President are chosen by the Federal Legislature for two years from among the members of the Court.

(6) *Payment of Members.*

(1833). Art. 96. No fixed salary, but fees paid out of the Federal Treasury for every day's work.

1848. Art. 99. As 1833.

(1872). Art. 104. Left to Federal legislation.

1874. According to the Federal law, Arts. 8, 14, the President receives 11,000 francs per annum, the judges each 10,000 francs, and each of the secretaries (of which there must be two at least, one

of the July 17, 1873 Committee, p. 40) omitted the limitation, and this suggestion was twice accepted by the House (by 56 to 28, and by 61 to 33 votes; *Protokoll*, 1873-4, pp. 169, 189). Its insertion, however, was proposed by the Stände Rath (by 22 votes to 18; *Protokoll*, 1873-4, p. 358), thus confirming the proposal of its Committee of July 18, 1873 (see the *Protokoll* of the latter, p. 37), and their proposal was accepted by the National Rath Commission and by the House itself, by a vote of 58 to 43, after an interesting debate (*ibid.* 270-2). Thus the Constitution of 1874 agrees in this point with 1848 as against the draft of 1872. As the draft of 1833 retained the old Diet of 44 members chosen by the cantons, this question was left entirely to the decision of the cantons.

¹ This was proposed by the National Rath in 1872, but given up in favour of the draft of the Stände Rath (*Protokoll*, 1871-2, p. 568).

² The Committee of August 16, 1847 proposed to give the election of the President to the Federal Legislature, and that of the Vice-President to the Court itself (*Protokoll*, p. 139). It decided too that where ineligibility for re-election was not expressly stated, re-eligibility was to be presumed (*Protokoll*, p. 183).

from German, the other from French-speaking Switzerland—both speaking German and French and one also Italian—chosen by the Court by ballot for six years), from 6000 to 8000 francs. The assistant judges receive 25 francs a-day and a fixed travelling allowance; the ordinary judges and the secretaries further, when away from the seat of the Court on official business, 15 francs a-day and a fixed travelling allowance (Federal law of Dec. 22, 1874).

The Federal law of June 27, 1874, Articles 10-24 (in many points simply a reproduction of that of June 5, 1849), contains many other regulations as to the Federal Court. In cases of elections, and in civil and constitutional causes, seven judges form a quorum, and the number present must always be uneven (apparently because the President has no casting-vote). The judges (but not the assistant judges) are required to reside in the town where the Court is fixed; this town is Lausanne, as determined by a decree of the Federal Executive, dated June 26, 1874. The vacations must not exceed four weeks in the year¹, and even then the President or Vice-President must be at Lausanne. Temporary leave of absence may be granted to the members of the Court and to the secretaries.

A judge, ordinary or assistant, *cannot sit* when his relatives by blood or by marriage in an ascending or descending line, or collaterals up to and including first cousins, or brother-in-law are in any way interested in the case. He is similarly disqualified from sitting when the affairs of his ward are under consideration, or in a case in which he has taken any part previously as Federal or cantonal official, or judge, or arbitrator, or counsel, or in affairs relating to an incorporated company of which he is a member, when his parish (Gemeinde) or canton of birth is a party, or when a suit is brought against the executive or legislature of his canton of birth. A judge of either kind may be refused by a party to a suit if the said judge is an enemy of or dependent on one of the parties, or since the institution of the suit, as a member of the Court has expressed his opinion on it; but the Federal Court as a whole must be accepted by the parties. If by reason of such refusals there are not enough members to form a quorum, the chairman selects by lot from among the presidents of the Supreme Cantonal Courts a sufficient number of 'extraordinary assistant judges' *pro hac vice*. All members and officials of the Court are bound by oath to fulfil the duties of their respective offices: in the case of members of the Court it is administered in the presence of the Federal Legislature.

¹ By (1833) Art. 95, it was provided that the Court should sit every year at fixed times, but that the President at the request of the Federal Executive (and also, in the second reversion, at the instruction of the Federal Legislature) was to call a special meeting. There seem to be no provisions on this point in 1848 and (1872).

Such oath may be replaced by a 'Handgelübde' or raising of the hand in the case of persons objecting on conscientious grounds to take an oath. The Court sits and gives judgment in public, but not the juries or during the preliminary enquiry. The President settles the order of business and maintains order in Court, being empowered to imprison disobedient persons for twenty-four hours, and in criminal cases to fine up to fcs. 100, and to imprison up to twenty days. He superintends the work of the minor officials of the Court. Every year the Court *is bound to lay an account of the business transacted by it during the past year before the Federal Legislature*, which has a right to criticise any act of the Court, but can alter by a law alone any of its decisions of which the Legislature may disapprove. All officials of the Court have the right of transacting in any canton (without needing to ask leave of the cantonal authorities) any business which falls within their jurisdiction¹. A Federal law of June 25, 1880, regulates the costs of the Court, which are defrayed out of the Federal Treasury, and the fees which are to be paid to it by parties to a suit heard before it.

W. A. B. COOLIDGE.

¹ It must be borne in mind that there is nothing in Switzerland which corresponds to the district and circuit Federal or United States courts in America. Hence in Switzerland Federal officials commonly transact business in the cantons, but cannot decide cases; whereas in America the district and circuit United States courts may in certain cases have concurrent jurisdiction with the States courts, while an appeal lies from the former to the Supreme Court of the United States.

THE DEEDS OF ARRANGEMENT ACT, 1887.

IT is doubtless very convenient that in a country largely populated, in which a vast number of people are engaged in mercantile dealings, the buyers and sellers respectively should be able to know something of the honesty and the solvency of those with whom they traffic; but it by no means follows that one party to a contract perpetrates a fraud on the other if he does not publish an account of his previous trade transactions and of his present position. A moral fraud is effected if a purchaser buys that which he knows he cannot pay for, and poses before the seller as a person who may be supposed to be solvent; but the scope and powers of fraud are infinite, and it is impossible for legislation to strike at every indication of it. A great deal must necessarily be left to the traders themselves, and in the long run their own intelligence and self-interest will protect them more effectually than all the laws that ever were made.

The Act to provide for the registration of deeds of arrangement, passed on the 16th September, 1887, was undoubtedly intended to put down, to some extent at least, an evil which (it was said) the mercantile public complained of. It was said that under the law as it then stood a debtor, being insolvent, might, in order to avoid bankruptcy process, or for any other reason, enter into a private arrangement with his creditors, or some of them, whereby the real control of his future business was taken out of his hands, and then incur fresh debts with other people who, ignorant of his position, might trust him as a solvent man, or he might possibly agree with his creditors for the payment of a composition on their debts, and, having thus reduced his liabilities, proceed to improve his position in the future. The first case might, and probably would, involve a fraud on those who afterwards dealt with him in ignorance of what had been done. The latter would in most instances not be injurious to his future creditors. It has nevertheless been in effect determined by the legislature that a fraud is put upon all those who may deal with a man after he has made any compromise with creditors if he has not published it to the world, so that the past may act as a warning for the future. The Deeds of Arrangement Act was passed in the interest of this great principle, and of course, if it is fitted for the purposes designed, the commercial and moral public ought to be greatly benefited by its operation. Whether honesty or even public morality can be manufactured by legislative

enactments is sometimes doubted by those who cannot see in the present state of the trading mind the elements of a mechanically forced millennium. The idea no doubt is that publicity in relation to pecuniary matters enforces honesty. In some cases it may do so. In others it seems to have rather the opposite result. Take for instance the effect of the Bankruptcy Act, 1869. Under that Act every proceeding, whether in bankruptcy or for liquidation or composition, was advertised, records were kept of the resolutions that were passed, and as much publicity as could possibly be attained was given to whatever was done. Lenient in other respects, the Bankruptcy law under that Act was severe in respect of advertisements and registrations. So lenient in administration was it that very few indeed were the arrangements made out of Court, and yet it may be questioned if the publicity given to failures made debtors more honest or creditors more careful. Men would in many instances fail again and again, always coming up bright and shining, and always able to find people who would trust them. In fact, publicity rather seemed (it may be only 'seemed') to engender a brazen and corrupt tone of mind than otherwise. So apparently thought the Legislature, for the Bankruptcy Act of 1883 was intended to act as a thunderbolt hurled at the moral laxity of commerce which its predecessor had patronised. But the very sternness of this latter measure had a painful result. Its very threats destroyed the candour which had characterised society prior to its existence. In the last year of existence of the Act of 1869, in the year 1883, the exact number of failures recorded was, I believe, 10,183. In the year 1884, the number was 3,231; so that if public records could prove anything, the commercial virtue of the kingdom was on the 1st January, 1884, 68½ per cent. greater than it was on the 31st December, 1883. The improvement, unfortunately, was only superficial. Two-thirds of the debtors and creditors in the kingdom preferred private arrangements to the operation of the new Bankruptcy Law. They did not so much object to publicity as they did to other matters which the Act of 1883 would have brought perhaps painfully to their notice.

The result of the working of the old Act showed that publicity by itself was neither a deterrent to debtors, nor did it, as a rule, make creditors cautious; and if this was so, may one be permitted to doubt whether an Act the main object of which is to give publicity to transactions relating to insolvents and their estates outside bankruptcy is likely to be really beneficial. However this may be, the intention of the Act is good. Let us consider its probable operation, for up to the present we have had no cases of any importance to show what interpretation will be put upon its clauses.

The effect of it may be shortly stated thus. Every document coming within the statutory definition of a deed of arrangement is to be duly registered, and in default of registration is to be void. It will be readily understood therefore that whatever arrangement is made otherwise than by a document is not affected by the Act; that only such documents as come within the definition are so affected, and that the efficient operation of the Act will depend upon the comprehensiveness of the definition.

The defining clauses are ss. 4 and 19. They run as follows:—

S. 4 (1). 'This Act shall apply to every deed of arrangement as defined in this section, made after the commencement of this Act.'

(2). 'A deed of arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to Bankruptcy), that is to say:—

'(a) An assignment of property;

'(b) A deed of, or agreement for, a composition.

'And in cases where creditors of a debtor obtain any control over his property or business;

'(c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business;

'(d) A letter of license authorising the debtor or any other person to manage, carry on, realise, or dispose of a business with a view to the payment of debts: and

'(e) Any agreement or instrument, entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business with a view to the payment of his debts.'

S. 19. In this Act, unless the context otherwise requires:—

'“Court or a Judge” means the High Court of Justice and any Judge thereof;

'“Creditors generally” includes all creditors who may assent or take the benefit of a deed of arrangement;

'“Person” includes a body of persons corporate or unincorporate;

'“Prescribed” means prescribed by rules to be made under this Act;

'“Property” has the same meaning as the same expression has in the Bankruptcy Act, 1883;

'“Rules” includes forms.'

The effect of section 4 is to confine the interpretation of the term 'Deed of Arrangement' to the instruments referred to in subs. 2:—

A Deed of Arrangement must be an instrument, that is to say, an instrument in writing, whether under seal or not, having certain characteristics. Let me pause here for a moment to observe that it is rather a pity to disturb old-fashioned prejudices, even though they are prejudices. To some men (let me include myself in the number) it is startling to be told that a deed need not be under seal. The definition in question gives a brevet rank to unsealed agreements which I cannot but think is a little unnecessary. There, however, the definition is, and so we must remember in construing the Act that a Deed of Arrangement is not bound to be a deed.

The document is to be 'made,' that is, it is at least to be signed 'by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally.' I assume that the intention of this passage is that the document is to be made by debtor for or in respect of his affairs. But this is not quite clear; the words 'by, for, or in respect of the affairs' might be read 'by, or for, or in respect of the affairs,' and then any deed made by the debtor or any person which, to use the words that follow, is 'for the benefit of his creditors generally,' would be within the Act. It can hardly have been intended, if a relative of the debtor makes a documentary arrangement for the benefit of the debtor's creditors, that such document shall be registered. The word 'for' is somewhat redundant and harsh, and I think that the construction 'by a debtor for or in respect of his affairs,' meaning 'by a debtor in respect of his affairs,' is most likely to be adopted. Anyway, one cannot but regret that there should be even a modicum of doubt as to the interpretation of this part of the clause.

The next part of the sentence, 'for the benefit of his creditors generally,' is also, having regard to the interpretation clause, s. 19, somewhat puzzling. These words, 'for the benefit of his creditors generally,' were used in sec. 6, subs. 1 of the Bankruptcy Act, 1869, and they took the place of the words 'for the benefit of all his creditors' in sec. 68 of the Act of 1849. *Prima facie* the meaning of 'creditors generally' is 'all the creditors,' and I suppose that it was at first the intention, under this Act, that the words in question should bear this interpretation; but if so the intention was afterwards thrown overboard, for the 19th sec. provides that 'creditors generally' includes all creditors who may assent or take the benefit of a deed of arrangement. This seems to be somewhat confusing, for as a deed of arrangement may, e.g. be a deed of assignment of property, such a deed, if made for the benefit of certain creditors who assent it, becomes a deed made for the benefit of creditors generally within the words of the statute. No doubt there is

another way of putting the case. The section may refer only to such deeds as are made 'for the benefit of creditors generally or for the benefit of all creditors who may assent to or take the benefit of such deed,' leaving it at the option of every creditor to come in under the arrangement; but such an interpretation would defeat the intention of the Act, for a debtor would then only have to debar one or more creditors from having any right under the deed, and it would thereupon be no deed of arrangement within the statute. I am afraid that the words 'creditors generally' must mean or include 'creditors not generally,' and if this be so, then a deed of arrangement with only a few creditors is void if not registered. But here again a difficulty arises. Does the word creditors necessarily imply the plural number? Probably it does; but under an Act for shortening the language used in Acts of Parliament (13 & 14 Vic. c. 21. s. 4) words importing the plural include the singular unless expressly excluded by words, and therefore unless the strict reading of the context which includes the word 'all' before the word 'creditors' in the interpretation clause expressly excludes the application of the last-named Act, a deed of arrangement with a single creditor and for his sole benefit will be for the benefit of creditors generally, and will, unless registered, be void under this statute. The position therefore is this. If it shall be held that the Act only affects deeds or agreements made for the benefit of all creditors or of all who at their own option shall assent to, or take the benefit thereof, the Act may be avoided by debarring one or more creditor or creditors from the benefit of it. If, on the contrary, it is held that a deed or arrangement made for the benefit of some creditors only is within the Act, then it will be bad unless registered if only made for the benefit of two of them. And if bad when made for the benefit of two small ones, why is it to be free from registration if made for the benefit of one large one? The fraud (if fraud there be) on the public is the same in the latter case as in the former. It may be suggested that in the case of a single creditor the Bills of Sale Acts step in, but I think the answer will be that the Bills of Sale Act, 1882, only deals with documents relating to a particular class of property where those documents are given to secure the payment of money, and that the statute now under consideration is not confined to such property, nor to cases where the document is only given as security. The Bills of Sale Act, 1878, is also limited in its operation, and non-registration under it does not absolutely avoid the document given.

But if there is a difficulty in ascertaining *a priori* whether or not an instrument is within the statute or not, there is at least an easy way of getting out of this difficulty by doing without any instrument

at all—‘*Crescit in orbe dolus*,’ the free interpretation of which, I take it, is ‘The children of this world are in their generation wiser than the legislature.’ Very shortly after the Act was passed it was suggested that it is only when there are instruments that such instruments can be registered, that agreements can be made orally, and that the most rigorous reading of the Act cannot make it apply to a bill of exchange or promissory note given by a debtor to his creditor in payment of his debt. ‘Let,’ it was said, ‘a debtor give such a negotiable security to his creditor for the full amount due, and five minutes afterwards let him discount his own acceptance for, say five shillings in the pound.’ There is clearly nothing to register, and the operation of the Act is avoided. Again, instead of one creditor let twenty creditors be present. To each of these the wily debtor gives his acceptance for the full amount of the debt, and presently finding himself (of course unexpectedly) in possession of sufficient means, he discounts these several papers at a low figure. The Act has left him power to do this, so he is quite right in doing it. He is not even bound to do as much as this. If he calls his creditors together and offers them a percentage on their debts, and they orally assent to accept the same, and he then and there pays to each the requisite amount in discharge, there is nothing to register, for there is no document. Many other ways may be suggested for avoiding the Act. I have only referred to those which I have been informed are frequently adopted. So long as there is no instrument assigning property or deeds, agreements or licenses in writing, such as those referred to in section 4, subs. 2, made by signature, the debtor and those creditors who object to unnecessary publicity can plead that the statute gives a tacit assent to their actions.

I do not propose to deal at length with subsections *a*, *b*, *c*, *d*, *e*. of the second part of section 4; but one or two observations may be made in relation to them. First, to an ordinary understanding a composition means a new agreement whereby the debtor is either absolutely released from his debts in consideration of a present reduced payment, or he is enabled to obtain that release eventually on making some future payment or payments, all personal remedies being stayed against him in the meantime. Secondly, *c*, *d*, and *e* only refer to cases where creditors of a debtor obtain any control over his property or business, and *d* only refers to a letter of license for a specific purpose. Now, the old form of a letter of license was that of a deed poll signed by creditors only, and the effect of it was that the creditors undertook not to take any process against the debtor for a specified time. It did not convey property, nor was it a deed or agreement for a composition, nor did the creditors

under it obtain any control over his property or business. The creditors trusted to the honesty of the debtor, and they expected that he would out of his trading pay his debts, and therefore the license was given with a view to the payment of his debts, and to enable him the better to do so. Such a deed or document, if now given, would have the same effect. It would be a giving of time for the payment of debts, but as under it the creditors would not obtain any control over the property or business of the debtor, it would appear not to be within the Act, and not to require registration. Other instances may be adduced showing that the Act apparently narrows its operation to such an extent that its use is merely optional, whereas it was meant to be compulsory. As the object of the Act is to defeat dishonesty and fraud upon those who are not parties to the arrangements referred to, why should loopholes have been left by which dishonest persons can escape from its pressure?

In dealing with the remainder of the Act certain points arise which require notice.

S. 5. 'A deed of arrangement to which the Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof and unless the same shall bear such ordinary and *ad valorem* stamp as is under this Act provided.' Now, although seven days is rather a short time to allow for registration, inasmuch as the time is to run from the date when the first signature is appended to the document, we must assume that this point was duly considered and thereupon the question was concluded. No doubt it was also thought that there might be instances in which a fortnight would be wanted to obtain the assents or signatures of creditors before registration, and with the view of assisting in such cases as well as with that of providing for instances where under stress of circumstances a debtor or other the primary executant might be out of the jurisdiction, the provision in relation to the time to elapse after execution of the document out of England or Ireland was made. It must have been that with the idea of allowing to every debtor a fortnight if he really wanted it, it was permitted, that, if before executing the deed he would betake him to France or to Scotland and there put his hand and seal, or his hand without his seal, to the document, he should have a fortnight afterwards before he need register it.

I am not quite clear as to what is meant by the expression in relation to the document arriving in England or Ireland in the ordinary course of post. I assume that it must mean to refer to the time when it arrives at its destination in England or Ireland, and not when it simply arrives within the country. Of course, also the Act means that if the deed is to be registered in England, and is first executed in Ireland, the week is to run from the same period as it would do if the execution was in Scotland, and *vice versa* if the deed is executed in England and is to be registered in Ireland; so that the result of the whole section is, that if a deed of arrangement is first executed in the country wherein it is to be registered it will be void unless registered within one week from the first execution; that if it is executed out of that country the period allowed is fourteen days in addition to the necessary time of passing through the post, and that when registered it must bear such ordinary or *ad valorem* stamp as is under this Act provided.

Those who are engaged in carrying out great principles occasionally omit to notice petty details, and this possibly explains why the sixth section of this Act seems to be a little in contradiction to section five. I have already pointed out that in some cases a deed is to be void unless registered within fourteen days after the first execution, allowance being made for postal transit. The sixth section of the Act directs that registration shall be effected by presenting to the registrar a true copy of the deed, &c. within seven days after the execution, so that if the Act is read strictly a deed executed out of the jurisdiction is not to be void if registered within fourteen days after execution, provided nevertheless that it must be registered within seven days from the same date. Of course, the way to get out of the difficulty is to read the words in the sixth section limiting the period as only applying to deeds executed in the country of registration, but surely there is in the clause an indication of a laxity of thought which ought not to obtain in such an august body as the legislature of this country. Is there not also a little carelessness in the wording of the second sub-section of the sixth section?

It runs as follows:—

‘No deed shall be registered under this Act unless the original of such deed, duly stamped with the proper inland revenue duty, and in addition to such duty a stamp denoting a duty computed at the rate of one shilling for every hundred pounds or fraction of a hundred pounds of the sworn value of the property passing, or (where no property passes under the deed) the amount of composition payable under the deed is produced to the registrar at the time of such registration.’

Now, it will be remembered that when registered the deed is to bear 'such ordinary and ad valorem stamp as under this Act provided' (see subs. 5). The idea was, no doubt, that an ad valorem stamp would be prescribed for all deeds which should require registration; but it would seem that this subsection only provides for ad valorem stamps where either property passes or where there is a certain composition payable under the deed.

A reference to clauses *c*, *d*, and *e* of subsec. 4, which deal with arrangements for the payment of debts as distinguished from composition, will show that deeds or documents such as they include will not necessarily pass property nor make any composition payable. This will therefore raise the necessity for a modified interpretation of the final words of section 5, and these words will have to be read 'such ordinary and such ad valorem stamp, if any, as is under this Act provided.' The words in the earlier section are not happy, and it is the misfortune of this piece of legal edifice that the words of subsec. 2 of sec. 6 aid and abet those in the earlier section in their misleading tendency, for it will be noticed that here also it is stated that every deed, if it is to be registered, must have an ad valorem stamp on the value of the property passing or on the composition payable. Therefore either an addition must be made to the Act, such as above suggested, or if the words are read literally, as no ad valorem stamp can be placed on deeds which do not pass property or provide for composition, they cannot be registered. It would be absurd to suppose that the Act which requires registration also forbids it, and if the literal construction is followed the result must be that all deeds which do not answer to the above requirements are not within the Act. Therefore, as this construction would eliminate from the operation of the Act all those deeds which do not pass property and are made with a view to the payment of debts, words must be added or imagined which show that an ad valorem duty is not required except for deeds which pass property or provide for a composition.

May I point out that the architects of this Act seem to have overlooked the possibility of a course of action whereby the Revenue will be prevented from receiving that profit on the stamps of a deed of arrangement which I suppose it was intended should be paid? An ad valorem stamp is required when property passes on the value of that property, 'or' (where no property passes under the deed) on 'the amount of the composition payable under the deed.' Now it is not an uncommon thing for persons, especially those who are not quite solvent, to object to pay more than they are actually obliged for revenue purposes. Where the stamp on a composition deed pure and simple would be considerable, we may be sure that

the debtor would avoid having to pay it by conveying some small amount of property upon the value of which the ad valorem duty would have to be estimated. By simply inserting in the deed an assignment of, say an old tooth-brush or a mouse-trap, the value of which being under one hundred pounds would only entail ad valorem duty to the amount of one shilling, the debtor will save himself from the necessity of paying a very much larger sum for the stamp on a large composition. The only other question of importance which the contemplation of this Act has forced upon me is in relation to the country of Registration. The fifth clause, as will have been noticed, mentions England and Ireland. 'If it is executed out of England or Ireland respectively, then within seven days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively,' &c. This certainly does not say where registration is to be effected. Now, when we come to sect. 8, subs. 1, we find that the Registrar of Bills of Sale in England and Ireland respectively shall be Registrar for the purposes of this Act, and we know that registration is to be effected by presenting and filing with the Registrar a copy of the deed. So that we are so far left in doubt as to what deeds are to be registered in England and what in Ireland. In section 13, which does not apply to Ireland, there is indeed a provision for a subsequent local registration where the debtor lives outside the London Bankruptcy district; but this does not seem to help the present question. We may suppose indeed that where a man and all his creditors live in England, or where any property conveyed is in England, the English Registrar will be the proper officer to register the deed. But supposing any creditor is in Ireland, is there anything to prevent an English debtor proceeding to Ireland and executing and registering the deed there? I have been unable to find it. In fact, upon the face of the Act the legislature has most impartially left it to a debtor to choose whether he will register his deed in Ireland or in England.

My main object in drawing attention to the apparent defects in this Act is, that if there is a fraud to be overthrown it may be overthrown. If there really is any virtue in publicity, let publicity be obtained. A measure which leaves very much to the culprit the amount of his punishment, or that leaves to a debtor the choice as to what extent, if any, he shall become amenable to the law, is not likely to be of substantial service to public morality, and seems (it may be only 'seems') to require amendment.

E. COOPER WILLIS.

BRACTON'S NOTE BOOK¹.

SOME persons might think that I ought to feel rather awkward in writing this notice of Mr. F. W. Maitland's work. Two circumstances there are which certainly place me in a peculiar position. The editor is an active contributor to this REVIEW, and I would have sought some other channel to express my opinion, if I felt bound for this reason to be very moderate in my praise. But I do not feel bound by the fact. This REVIEW, as every other periodical of solid standing, cannot put a kind of ostracism on the work of its helpers. There is certainly a mean term between crying up a book in the spirit of a partizan and skipping over the merits of a most important production. Let us try—in a new sense—not only to be friendly to Plato, but to serve Truth, which goes before Plato. And so I will say at the very outset, that Mr. Maitland's work in his Introduction as well as in the edition of Bracton's Note Book is simply a model of its kind. It combines patient, industrious investigation, caution and firmness of inference, with a keen critical faculty in sifting evidence, and great acuteness in the combination of facts. The work of a lawyer, in the best sense of the word, it goes the ways and furthers the aim of historical research.

I need not dwell long on another consideration. I demur to the 'exception' which may be raised against me as a reviewer on the ground of having had to do myself with the British Museum MS. Add. 12,269. I shall not deny, of course, that I feel proud of having been the first to speak about 'Bracton's Note Book' in public, and of seeing my letter to the *Athenæum* printed at the head of such an edition as Mr. Maitland's. But I feel shy and somewhat ashamed of myself as one who has to stand in poor attire in the first rank of a brilliant array. Mr. Maitland has not only corrected the mistakes and oversights which I made in my hasty attempt to bring the matter to issue, but he has worked out the lines of argument and raised a number of points which I did not mention at all. My letter bears to his Introduction the relation of a rough pencil sketch to a finished picture. In a word I claim only one merit—a great one, it is true—the merit of having induced Mr. Maitland to do his work.

¹ *Bracton's Note Book*. A collection of cases decided in the King's Courts during the reign of Henry the Third, annotated by a lawyer of that time, seemingly by Henry of Bracton. Ed. by F. W. Maitland. 3 vols. London: C. J. Clay & Sons [Camb. Univ. Press]. 1887.

I cannot attempt to give a 'résumé' of the Introduction: the readers of this REVIEW will, I hope, look up the facts for themselves. But I shall touch briefly on those points which appear to me to be of chief importance, or to call for some remark and explanation. Before treating of the Note Book itself the editor paves his way to it by a general survey of the conditions in which Bracton's celebrated treatise was composed. It stands quite unique in merit among the productions of medieval lawyers, and the reason has to be sought not only in the author's transcendent capacity, but also in the exceptional advantages afforded by the times. For most European nations the thirteenth century has been the epoch of the great 'parting of the waters' in the dominion of law. The Teutonic rules brought by the Conquest had been gradually breaking up to local customs, and, if anything, had degenerated in their substance. Meanwhile society begins its ascendant movement, roughly speaking, since the eleventh century. The development of intercourse, of husbandry, of political relations, was urgently requiring new legal forms, and they gradually emerge under the influence of the regenerated state and of the study of Roman law. The time when the new system gets settled down was certainly *the* historical moment for defining its broadest principles and its chief applications in legal literature. Bracton wrote his book when the great rules of English law were in full working order, but he wrote it in the freshness and vigour of new life, quite free from the hampering action of ossified forms. In speaking of Bracton, as the representative of a crisis, Mr. Maitland naturally adverts to those who have worked during the same crisis on the Continent. He notes down the curious fact, that the English lawyer seems, at first sight, to be much more subjected to Azo than Eike von Repkow and Beaumanoir, although Germany and France developed their later legal system in the bond of Romanism. I do not think the comparison points this way, not as to France at any rate. True, Beaumanoir's book is more distinctly Teutonic than Bracton's, although there is a very marked Roman element in it too. But Beaumanoir ought not to stand alone by the side of Bracton. He was summarizing a provincial 'coutume,' and to obtain an equivalent to the treatise 'de legibus et consuetudinibus Angliae,' we ought to reinforce the 'Coutume de Beauvaisis,' at least by P. de Fontaine's 'Conseil,' and the so-called 'Etablissements de S. Louis.' Fontaine is even more dependent on Romanistic terminology and misconstrued Roman rules than Bracton is dependent on Azo. The 'coutumes' of Orléans and Anjou, which go under the name of S. Louis' laws, and Beaumanoir, are in fact presenting three different stages of amalgamation between classical jurispru-

dence and barbarous customs ; taken altogether they afford almost all the varieties of the process which Bracton exhibits in his one work¹. Speaking broadly, the chief distinctions between the English and the French system of the thirteenth century lie in their political and processual features. In one case the King has succeeded to centralize justice round the throne, in the other the revival of jurisprudence is acting on a provincial basis. In one case trial by jury keeps the legal institutions from falling entirely into the hands of a professional class, in the other the 'procédure d'enquête' begins developing into the isolated action of judicial authorities.

Bracton's work not only falls into a momentous epoch of legal history—he had to act and to write during the great constitutional struggle between Henry III and the Barons. Mr. Maitland shows that he decided pleas before the King during a great part of his career ; a fact which did not prevent the Barons from employing him in the time of their sway. A fitting close to a long life of learning and impartiality is afforded by Bracton's appointment in 1267, just before his death, to hear the complaints of the disinherited, i. e. of those who were wrecked by Montfort's defeat. The great lawyer seems to have taken his position more or less outside of party politics, and it is characteristic of him, that the allusions to the constitutional struggle which occur in his work are in contradiction to each other ; he does not seem to have been an adherent of either of the conflicting theories. His learning was based on the decisions of Martin Pateshull and William Raleigh, while he very rarely mentions one of the chief supporters of Henry III's misrule—Stephen Segrave. Mr. Maitland rightly lays stress on the fact against Bishop Stubbs, but he goes too far perhaps in conjecturing that Bracton's bias was 'not political but juristic, that Bracton regarded Pateshull and Raleigh as the heads of a school of law and of lawyers,' the like of which is not to be found in later epochs of English legal history. I do not know of any facts which would entitle us to consider the theoretical opposition between Pateshull and Segrave to be a deeper one than that between Coke and Bacon for instance, and, if anything, the latter comes more under the distinction of schools than the former.

As to the text of the treatise, Mr. Maitland agrees with the view I have put forward in this same REVIEW, namely that our current editions give a consecutive text of a work which has been considerably enlarged by additional remarks and glosses. Only a detailed critical study can lead to definite results as to the com-

¹ Compare as to this *Paul Viollet, Les Etablissements de S. Louis*, and the same author's '*Précis de l'histoire du droit français*.'

ponent parts, but even on the strength of what has been brought to light already, I venture to suggest one position, which further study will probably strengthen. The parts of the treatise that are altogether omitted in the annotated part of Digby 222 (Bodleian MS.) can never have been the work of Bracton himself. They are not many, but comprise some not unimportant points.

Nobody will deny that if we could trace Bracton's rules and precedents to the cases which suggested them, we should make a most important step in the historical study of English law. I think that after Mr. Maitland's exhaustive publication there is no reasonable possibility to doubt that the British Museum MS. Add. 12,269 presents a collection of cases compiled for Bracton, and annotated by him or under his direction. The argument may be summarized in Mr. Maitland's own words:

'The treatise (Bracton's) is absolutely unique; the Note Book, so far as we know, is unique; these two unique books seem to have been put together within a very few years of each other, while yet the Statute of Merton was *nova gracia*; Bracton's choice of authorities is peculiar, distinctive; the compiler of the Note Book made a very similar choice; he had, for instance, just six consecutive rolls of pleas *Coram rege*; Bracton had just the same six; two-fifths of Bracton's five hundred cases are in this book; every tenth case in this book is cited by Bracton; some of Bracton's most out-of-the-way arguments are found in the margin of this book, in particular that about the binding of land by warranty, that about the ejectment of a disseisor; the same phrases appear in the same contexts, *Iuste propter ius sed iniuste propter iniuriam*, *Nihil certius morte, nihil incertius hora mortis*; Corbyn's case, Ralph Arundell's case are "noted up" in the Note Book; they are "noted up" also in the Digby MS. of the treatise; with hardly an exception, all the cases thus "noted up" seem plainly to belong to Bracton's country, to affect persons whom Bracton must have known, Raleighs, Traceys, Gorges, Blanchminsters, Winscotts, Arundells, Punchardons; lastly, we find a strongly intimate agreement in error: the history of the ordinance about special bastardy and the *Nolumus* of Merton is confused and perverted in the same way in the two books. Must we not say, then, that until evidence be produced on the other side, Bracton is entitled to a judgment, a possessory judgment?' (pp. 116, 117).

Mr. Maitland is cautious to a fault in his statements and inferences. In speaking of the 'two-fifths' of Bracton's cases which occur in the Note Book, for instance, he takes into account some fifty cases which could never have made part of a collection of old trials, being references to more recent occurrences. Strictly speaking, they

ought to be left out in the reckoning, but Mr. Maitland wants to guard even against the shadow of an accusation of forcing the argument. His ultimate verdict carries the more weight with it. Not in order to strengthen it, but for the sake of clearing up particular points, I may venture to offer the following suggestions.

1. The notice in the Exchequer Roll, quoted by Madox, that in 1258 orders were made for the restoration to the Treasury of the rolls of Martin Pateshull and William Raleigh, which were in the hands of Bracton, and of Segrave's rolls detained by the Abbot of Leicester and the Prior of Kenilworth (the Introduction, p. 25). This fact might lead one to think that possibly it was not Bracton alone who was engaged in a record-study of the law in the middle of the thirteenth century. But the Abbot of Leicester and the Prior of Kenilworth were looking, for whatever purpose it may be, to authorities quite different from those on which Bracton relied. And this makes the coincidence with the Note Book even more striking. From internal evidence it appears that the Note Book can hardly have been compiled later than in 1256 and hardly much earlier (Intr. 82). In order to separate the Note Book from the treatise we must suppose that about this very year, at the very time when Bracton was engaged in the study of Pateshull's and Raleigh's rolls, and necessarily making extracts from them, some other lawyer of high standing and learning had got hold of the very rolls in order to compile the Note Book. The supposition is mathematically possible, because it is not mathematically impossible that this supposed other lawyer may have always been using duplicate rolls, or that he may have completed his task before Bracton began his. But is it likely that things should have gone thus? I think even the mathematical balance of probabilities will lie strongly against a similar supposition.

2. I cannot help attaching some importance to the fact that in one case the compiler of the Note Book takes up a Roll from which he had already given extracts. It shows that he did not consider the matter in the roll as exhausted by the fact that some extracts had been made from it. This opens the way for a conjecture as to the missing cases, cases that is which are to be found in the treatise and not in the Note Book. As Mr. Maitland has it in another connection, Bracton may have compiled more than one Note Book, or he may have reverted to original rolls. I do not think this last very likely, because some means of 'orientation' were needed among the vast mass of records which have been used for the treatise.

3. As to the 'Nolumus,' I quite agree with the editor's explanation; it seems the only plausible and perhaps the only possible one.

But I would not risk to maintain that the story of the refusal on the part of the Barons presents the same gradual perversion of the original text as the Ordinance of 1234. I would not maintain it because there is no original text in the case. The version in the Statute Book has no claim to be considered as such, and this by Mr. Maitland's own admission (comp. pp. 105 and 115).

After all that has been said of the Introduction, I need not say that the edition has been prepared with all possible care and accuracy. The notes are given as sparingly and briefly as possible, but I doubt whether the editor has missed a single historical or legal point which required his commentary. I have not been able to notice a number of important questions raised and solved by Mr. Maitland, but what has been said may be sufficient, I hope, in order to draw attention to this very remarkable publication. I beg leave to point out, before concluding, that all my remarks applied to matter which as it were surrounds the chief problems. I do not see that there is anything to be altered or added in the treatment of these last. And then even this brief notice may show that we find in the Introduction a great deal more than the mere discussion of topics specially connected with the Note Book. Mr. Maitland has succeeded in giving to his work the broad basis of the general history of the time, and in treating this much-debated history originally. Altogether (may it be allowed for a foreigner to say it) English scholarship has every reason to be proud of this work, which will materially promote the study of medieval law.

PAUL VINOGRADOFF.

TESTAMENTARY CAPACITY IN MENTAL DISEASE.

IN this paper I propose to contend that the current of the comparative case-law of testamentary capacity in mental disease has, with a few temporary aberrations, steadily flowed from its commencement in support of the following propositions, which are consistent with, and not inaccurately represent, the most advanced medico-legal opinion.

PROPOSITION I.—A testator must possess a memory sufficiently active to recall (a) the nature and extent of his property, and (b) the persons who have claims upon his bounty: and a judgment and will sufficiently free from the influence of morbid ideas or external control, to determine the relative strength of these claims.

AUTHORITIES.—(1) *Combe's case* (Moor. 759; 4 Burn's E. L. 61; 3 Jac. I). In the Star Chamber, it was agreed by the judges that sane memory for the making of a will is not at all times when the party can speak 'yes' or 'no,' or had life in him, nor when he can answer to anything with sense: but he ought to be of judgment to discern, and to be of perfect memory, otherwise the will is void. (2) *Herbert v. Lowns* (1 Ch. Rep. 24; 3 Car. I). 'To a disposing memory it is necessary there be an understanding judgment, fit to direct an estate.' Cf. also *Winchester's case*, 6 Co. 23a; Trin. 41 Eliz. K. B. (3) *Harwood v. Baker* (3 Moo. P. C. 282, 1840), per Erskine J., at p. 290. 'In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard: but . . . he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property. The protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and more especially'—which was the case in *Harwood v. Baker*—'when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration.' (4) *Converse v. Converse*, per Redfield J. (21 Verm. R.). The testator 'must undoubtedly retain sufficient *active* memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to

each other, and be able to form some rational judgment in relation to them.' Cp. also *Blanchard v. Nestle* (3 Denio. 37) and *Simpson v. Gardner* (11 S. 1051), 1833, per Lord Cringlette. (5) The law as to those particular functions of the mind which must be sound in order to create a capacity for the making of a will is thus laid down by Sir James Hannen in *Boughton v. Knight* (L. R., 3 P. & D. 64), 1872. 'There must be a memory to recall the several persons who may be fitting objects of the testator's bounty and an understanding to comprehend their relationship to himself and their claims upon him. A sound mind does not mean a perfectly balanced mind, free from all influence of prejudice, passion or pride. The law does not say that a man is incapacitated from making his will, if he proposes to make a disposition of his property moved by capricious, frivolous, mean or even bad motives; eccentricities, as they are commonly called, of manner, of habit, of life, of amusements, of dress, and so on, must be disregarded. But there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a person exhibits towards one or more of his children must proceed from some mental defect in himself.' (6) *Morison v. Maclean's Trustees* (24 Dunlop, 625), 1862. 'The test of capacity to execute a settlement cannot possibly be stated without reference to the settlement itself' (per Lord Justice Clerk Inglis, at p. 631). (7) *Blewitt v. Blewitt* (4 Hagg. E. R. 410), 1833. 'When capacity is in question, the enquiry always is, Was it adequate to the act?' (per Sir J. Nicholl, at p. 452).

In support of this proposition the following cases may be cited: *English*.—*Greenwood v. Greenwood* (3 Curt. Appendix), 1790. *Banks v. Goodfellow* (L. R., 5 Q. B., per Cockburn C. J., at p. 559). *Smee v. Smee* (L. R., 5 P. D., at p. 90, per Sir James Hannen). *American*.—*Delafield v. Parish* (25 N. Y. 9), 1862. *Harrison v. Rowan* (3 Walsh C. C. 385, 386). *Boyd v. Eley* (8 Watts R.). *Scotch*.—*Campbell v. Davidson* (4 Muir 171), 1827. *Hogg v. MacNeill* (4 Muir 448), 1828. *Laing v. Bruce* (1 D. 59), 1838. *White v. Ballantine* (1 Shaw A. C. 472).

ILLUSTRATIONS.—(1) *A*, at the time when he made his will, had lost the use of his right side from paralysis, and could articulate nothing but 'aye' and 'ho' (for 'no'). The provisions were complicated, and were not originated by the testator, but suggested to him, and noted down, by interested parties. The will was reduced. *Gillespie v. Gillespie* (Fac. Dec. Feb. 11, 1817). Cp. a decision by Dr. Lushington, on precisely similar grounds, *Durnell v. Corfield* (1 Rob. E. R. 51, 1844). (2) A testatrix gave instructions for her will, which was prepared in accordance with them. At the time of execution, the testatrix merely recollected that she had given those instructions,

but believed that the will which she was executing was in accordance with them. The will is valid. *Parker v. Felgate* (8 P. D. 171, per Sir James Hannen, at pp. 173, 174), 1883. If the testatrix had merely authorised her solicitor to make a will and had then said, 'I do not know what you have put down, but I am quite ready to execute it,' the will would be invalid. *Hastilow v. Stobie* (1 P. & D. 64, 1865), overruling dicta of Sir Cresswell Cresswell in (a) *Middlehurst v. Johnson* (30 L. J., Prob. 14, 1860), and (b) *Cunliffe v. Cross* (3 Sw. & Tr. 36, 1863). (3) 'A sickly child, newly *pubes*, and without the knowledge of his curators, made a will in the absolute favour of the nurse, under whose care he had been.' The will was reduced as inofficious. (Nisbet's Doubts, temp. Charles II. 207.) (4) A, the testator, was aged and of doubtful capacity. His will was prepared by a solicitor, B, who was therein appointed executor and one of the residuary legatees. The will was pronounced against. *Durling v. Loveland* (2 Curt. 225), 1839. (As to the precautions necessary in such cases to rebut the presumption of undue influence, see the remarks of Sir H. Jenner, at p. 228.) (5) Ely Stott died 18 Nov. 1821, leaving a widow, and a daughter by his first wife. The amount of his personal estate was nearly £40,000. By his will, dated 26 May, 1818, Stott gave his daughter, to whom he had conceived a violent and irrational aversion, a life interest only in a comparatively small portion of his property. Held, by Sir John Nicholl, that this unfounded antipathy had prevented the testator from properly appreciating his daughter's claims upon him, and that the will must be pronounced against. *Dew v. Clark* (3 Add. 79-209. Cp. also 2 Add. 102 et seq., 1826).

PROPOSITION II.—Intellectual insanity *prima facie* destroys testamentary capacity: but this presumption may in any case be rebutted by evidence, of a lucid interval—or that the insanity and delusions of the testator were irrelevant to the subject-matter of his will, or insufficient to prevent the exercise of a disposing memory, judgment and will—at the time when the disputed instrument was made.

AUTHORITIES.—(1) An inquisition *de lunatico inquirendo* is presumptive, but not conclusive, evidence of testamentary incapacity at the time.

'Presumptive.' Cf. *Hall v. Warren* (9 Ves. 605, per Sir W. Grant M.R., 1804). *In re Watts* (1 Curt. 594, 1837). *Snook v. Watts* (11 Beav. 105, per Lord Langdale M.R., 1848).

'But not conclusive.' *Rodd v. Lewis* (2 Cas. temp. Lee 176, 1755).

(2) The presumption arising from residence in an asylum, or from other *prima facie* evidence of insanity, may be rebutted by

proof of a lucid interval, or that the insanity or delusions were irrelevant or immaterial.

Illustrations.—Lucid intervals. (1) *W. P.*, who for many years had been afflicted with habitual insanity, accompanied with intermissions, executed a will while confined in a lunatic asylum. The instructions for it were designed and written without assistance by himself, and the will made a natural and equitable distribution of his property. Probate granted. *Nichols v. Binns* (1 Sw. & T. 238, 1858). Compare the decision in *Martin v. Johnston* (1 F. & F. 122) in the same year. (2) *Cartwright v. Cartwright* (1 Phillim. 90, 122, 1793, 1795). *A*, a patient in an asylum, made a will in which she left practically her whole fortune to her nieces. The circumstances under which the will was executed were as follows:—‘On Aug. 14, 1775, *A* was supplied with pen, ink, and paper by Dr. Battie, the superintendent of the asylum, to quiet and gratify her, though he considered her at the time quite incapable of making a will. Her attendants retired, but watched her. She was so agitated and furious that they were fearful she would attempt some mischief to herself. At first she wrote upon several pieces of paper and got up in a wild and furious manner and tore the same, and threw them in the fire: and after walking up and down the room many times in a wild and disordered manner, muttering and speaking to herself, she wrote the paper which is the will in question.’ Probate granted on the grounds that (a) the will was originated and executed by the testatrix and (b) the provisions were ‘wisely and orderly framed.’

This decision has frequently been cited in support of the contention that the law at one time made the instrument in dispute the best, if not the sole, criterion of the capacity to execute it. But it is doubtful whether Sir William Wynne intended to lay down any such rule (cf. *Chambers v. Yatman*, 2 Curt. 415, Sir H. Jenner at p. 447, 1840): and if he did, it has since been distinctly repudiated. (*Brogden v. Brown*, 2 Add. 441, 1825.)

Other authorities.—Clarke v. Lear (Mar. 1791); *Coghlan v. Coghlan* (date not given).

Delusions foreign to the subject-matter of the will.—(1) *A* made a will in favour of *B*, his niece, who was living with him, and was the object of his favour and regard. At the time of executing this will, *A* was under a delusion that *C*, to whom he had borne a violent hatred, and who was actually dead, was still alive. *C* had no claim whatever on *A*. Probate granted. *Banks v. Goodfellow* (L. R., 52 B. 549, 1870). (2) Under the same circumstances, *A*’s hatred to *C* is such that the very mention of his name unfits him for business, and renders him unable to estimate the comparative claims of *B*, *D*,

and *E* upon his bounty. *Semble*. Probate would be refused. *Creagh v. Blood* (2 J. & La Touche, Irish, 509, per Sir Edw. Sugden L. Ch., at p. 515).

Delusion or insanity insufficient to suspend testamentary capacity as above defined.—(1) *A*, a testatrix, was under delusions, which were intermittent, and considered trifling by her friends, about her money matters. Her capacity to revoke a will is not destroyed. *Laing v. Bruce* (1 Dunlop 59, 1838). (2) *M* disinherited his relations, to whom he had conceived a strong dislike, which was not, however, proved to have been founded on delusions. *M* was alleged to have had a sunstroke when on service in Sierra Leone; and he believed that in youth he had been fed with game taken out of eagles' nests, and that soldiers suffering from yellow fever were in his bed. *M*'s will is valid. *Morison v. Maclean's Trustees* (24 Dunlop 625, 1862). *A fortiori* testamentary capacity is not destroyed by a delusion which quickens the testator's faculties. Cp. *Jenkins v. Morris* (14 Ch. D. 674).

The exceptions to this proposition are chiefly apparent. In *Deo v. Clark* there was the clearest evidence that the will in dispute sprang directly from the diseased belief of the testator: and further, it may be seriously questioned whether Sir John Nicholl's language will bear the construction popularly put upon it that delusion is the only criterion of insanity (cf. 3 Add. pp. 90, 93, 170, 204, 205, 206, with *Chambers v. Yatman*, 2 Curt., at p. 448). In *Waring v. Waring* (6 Moo. P. C. 341 et seq., 1848), Lord Brougham did indeed declare that any the least degree of insanity would vitiate a will, made under its influence: and this doctrine was accepted by Sir J. P. Wilde in *Smith v. Tebbitts* (L. R., 1 P. & D. 398–437, 1867): but in both cases, the presence of insane delusions, distinctly operating on the disposing mind of the testator, reduced this metaphysical analysis to the proportions of an *obiter dictum*.

PROPOSITION III.—A lucid interval is not necessarily a complete restoration to mental vigour previously enjoyed: nor is it merely the cessation or suppression of the symptoms of insanity: it is the recovery of testamentary 'memory, judgment, and will' as defined in Proposition I.

The history of this definition of 'lucid interval' is interesting.

'Not necessarily,' &c., per Eldon L. Ch. in *Ex parte Holyland* (11 Ves. 10, 1805), disapproving a dictum of Lord Thurlow.

'Not merely the cessation or suppression,' &c., see per Sir John Dodson in *Dyce Sombre v. Prinsep* (1 Deane, at p. 110, 1856).

'It is the recovery,' &c., *Towart v. Sellars* (Scotch Appeal, 5 Dow. a p. 236, 1817).

PROPOSITION IV.—An insane delusion is not merely an unfounded, though colourable, suspicion: nor even a belief which no rational person would have entertained: it is a persistent and incorrigible belief of things as real which exist only in the imagination of the patient, and which no rational person can conceive that the patient when sane would have believed.

History of this definition.

'Not a colourable suspicion.' *Chambers v. Fatman*, 2 Curt., at p. 448.

'Nor even a belief,' &c., per Lord Brougham in *Waring v. Waring* (v. ante) overruling Sir John Nicholl in *Dew v. Clark*.

'But a belief,' &c. Lord Brougham, *ubi supra*.

'Which no rational person,' &c. *Mudway v. Croft* (3 Curt. 671, 1843), implicitly disposing of the dictum of Lord Campbell in *Ditchburn v. Fearn* (6 Jur. 201, 1842).

In *Mudway v. Croft* the following passage from Dr. Ray's Medical Jurisprudence (at p. 131) is expressly adopted: 'It is the departure from the natural and healthy character, temper, and habits which constitute a symptom of insanity, and in judging of a man's sanity, it is consequently as essential to know what his habitual manifestations were as what his present symptoms are.' This doctrine has been applied with fair consistency. Cf. *Austen v. Graham* (8 Moo. P. C. 493, per T. Pemberton Leigh, 500-1, 1854), and *Dyce Sombre v. Prinseps* (1 Deane).

PROPOSITION V.—Neither subsequent suicide, nor supervening insanity will be reflected back upon previous eccentricity, so as to invalidate a will. Cf. *Hoby v. Holy* (1 Hagg. 146, 1828, per Sir J. Nicholl): aliter in the case of previous insanity. *Symes v. Green* (1 S. & T. 401, 1859).

PROPOSITION VI.—Affective, or moral, insanity does not (generally?) destroy testamentary capacity.

Illustration.—A, the validity of whose will was in question, took an irrational pleasure in hearing of the suffering of others, rubbing his hands, grinning, and otherwise manifesting his gratification at evil tidings. He was uncharitable and cruel. Probate granted. *Frere v. Peacocke*, 1 Rob. E. R. 442, per Sir H. Jenner Fust, at p. 456, 1846. (Cp. *Morison's case*, per Lord Cowan, 24 Dunlop 625, 1862.) *Semble*. Insanity of character ('primäre verrücktheit'), if sufficient to unhinge the disposing mind, would destroy testamentary capacity.

PROPOSITION VII.—Upon the executor who propounds a will rests the burden of proving (a) testamentary capacity, (b) knowledge and approval of its contents, and (c) due execution.

'The heir-at-law rests securely upon the statutes of descent and

distribution until some legal act has been done by which their rights under those statutes are lost or impaired.' (Per Thomas J., *Crowningshield v. Crowningshield*, 2 Gray 526.)

Other authorities.—*American.* *Quick v. Mason* (22 Maine 438); *Cilley v. Cilley* (34 ib. 162). *English.* *Sutton v. Sadler* (3 C. B. N. S. 87, 1857).

PROPOSITION VIII¹.—*Prima facie* an executor is justified in propounding his testator's will.

Cases.—*Boughton v. Knight* (per Sir James Hannen, 3 P. & D. 64). *Smee v. Smee* (5 P. D. 90).

The legal view of insanity in its forensic relations, civil and criminal, has been attacked, and attacked not only by alienists of the baser sort, on the ground that whereas in dealing with the criminal *responsibility* of the insane, we adhere to rigid and obsolete formulæ, and persist in defining that which is essentially undefinable, we yet recognise several distinct criteria of *capacity* in mental disease. Now it is no part of my present task to argue that the 'rules in Macnaghten's case' are not 'definitions of insanity' at all, but rough and approximate criteria of *punishable insanity*, or to maintain that the absence of any such criteria has seriously impaired the efficacy of French criminal law. But I respectfully claim that our law of testamentary capacity is not open to reproach. We have grasped the fact that the *disease* insanity is merely one of the indicia of the *state* unsoundness of mind. We have made no attempt to lay down abstract rules for determining in every case the presence or absence of testamentary capacity. We narrow the issue to the question, Was this man capable of making this particular will at the time of its execution? and we are warranted in so doing by the views of Taylor and Maudsley, who are the representatives of all that is best in modern medico-legal thought.

A. WOOD-RENTON.

¹ Added for the sake of completeness, though irrelevant to the main question under discussion.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Manual of Indian Criminal Law with Annotations. Second Edition.
By H. A. D. PHILLIPS. Calcutta: Thacker, Spink & Co. 1887.
8vo. xx and 881 pp.

THE compiler of this Manual tells us in his preface that it contains almost every Act which a magistrate in India is likely to require in the ordinary course of his criminal work. He further tells us that he has endeavoured to annotate the text in the only way which can possibly justify the existence of commentaries on Codes. What his ideas on this subject are may be gathered from the following extract from the preface:—‘It is the duty and function of a commentator to sift the chaff from the wheat, and to deduce some principle or *ratio decidendi* from long series of decided cases. If none can be adduced, then presumably the case law is defective, and the commentator should not hesitate to point out in what respects it is defective, unsound, or erroneous. If the rulings are contradictory and irreconcilable, that too should be clearly demonstrated. In a country which has Codes a commentator must prune away, so to speak, the overgrowth of case law, and must preserve the intention of the Legislature from being choked by its rank luxuriance. Further, it is the special duty of the Indian commentators—and this appears to me to be his (*sic*) most important and useful function—to show that the Indian Codes have no connection with English law, but are a distinct entity; to illustrate and interpret one part by another; to construe their provisions according to the fair import of their terms, taken in their usual sense, in connection with the context, with a view to effect their objects; to promote justice; and, above all, to preserve and enforce adherence to the intention of the Legislature. If a commentator has the necessary strength of mind, knowledge, and ability to do this, his commentary will be a power in itself, and will exercise a salutary and far-reaching influence on the courts, the administration of justice, and ultimately, perhaps, on the action of the Legislature.’

We are not informed, and there is nothing to show what are Mr. Phillips’s qualifications for the discharge of the high functions with which a commentator is here invested, or on what grounds he personally claims to influence the courts, the administration of justice, and even the action of the Legislature. Apparently he has not completed his education at any University, and he does not belong to either branch of the legal profession. It will, however, be reasonable to judge his pretensions by his performances, and we shall therefore examine how he has carried out the programme laid down in his preface.

It is in his opinion the most important and useful function of a commentator to show that the Indian Codes have no connection with English law, but are a distinct entity. Yet Mr. Phillips’s annotations are interlarded with references to English cases and English law—see, for example, pages 24, 26, 36, 57, 76, 89, 95, 102, 112, 113, 125, 131, 132, 134, 136, 139, 144, 157, 159, 169, 177, 182, 205, 213, 222, 337, 404, 419, 445, &c.; and he

further favours his readers with selections of curious points in criminal law culled from the systems of New York, Louisiana, New Jersey, Formosa, France, Belgium, Germany, Greece, and even China. Many of these cases and references have no relevant bearing upon the subject in hand; and the annotator, apparently for the purpose of showing off his knowledge, is guilty of the sin of 'dragging in' irrelevant matter, for which he is so hard upon the Indian pleaders in his preface. At page 227 he finds fault with the judgment of an able Indian judge on the ground that it is 'diametrically opposed to the English law and to the illustrations given in Stephen's Digest:' and at page 300, while regretting that many Indian judges have a scanty knowledge of the Indian Codes, and only a superficial acquaintance with English criminal law, he tells his readers that 'a thorough knowledge of English criminal law goes far to counteract a deficient acquaintance with the Indian Codes and Indian case law.' All this is rather at variance with the special duty, the most important and useful function of Mr. Phillips's Indian commentator.

He rightly says what he has doubtless read in some legal work—that it is the function of a commentator to deduce some principle or *ratio decidendi* from long series of decided cases. We do not, however, find any trace of Mr. Phillips's having attempted this proper function, and he is evidently quite incapable of grasping the intricacies of case law, and understanding or evolving the *ratio decidendi* which underlies a succession of cases. His Manual contains twenty-six Acts of the Legislature, which comprise over 1700 sections. There are in India four High Courts, and the hands of their thirty judges are very full, so that the number of decisions is large. The work of reporting is, however, under the supervision of the Courts and the Government, so that the published case law is kept within reasonable bounds. Nevertheless, if Mr. Phillips were to do for these 1700 sections this work of the commentator with reasonable completeness, the task would have been one of considerable magnitude. But he has not tried such a task. He has made his own selection of cases, taking those especially which in his opinion are unsound or erroneous, and *not hesitating to point out* in what respect he thinks them so. The following are specimens of his method:—page 73, 'The ruling at . . . is probably unsound;'—page 76, 'This is one of several instances in which High Court rulings have made the Indian law narrower than the English, though the words of the Code are wider than the words of the English statute law;'—page 91, 'As a matter of law and procedure much of the Calcutta case law is antagonistic to specific provisions of the Procedure Code;'—page 199, 'This ruling is open to question;'—page 218, 'The ruling in the case of . . . appears to be opposed to well-established rules of evidence;'—page 226, 'It will be observed that some of the Calcutta High Court rulings have made the Indian law actually narrower than the English law;'—page 329, 'A perusal of Savigny's treatise on possession is sufficient to expose the unsoundness of Mr. Justice . . . 's remarks;'—page 337, 'This nullifies the somewhat anomalous ruling in &c.' (here the Legislature had rectified an omission detected by the *anomalous* ruling, which could not have been different upon the unaltered language of the Act);—page 343, 'In some cases magistrates were abused' (*sic*, i. e. by the High Court) 'for looking at police papers; in others they were censured for not having taken the trouble to look at them' (here Mr. Phillips fails to understand the distinction between looking at the police papers in order to discover sources of evidence, and using the contents of the papers themselves as evidence);—page 493, 'The ruling of the Bombay High Court is clearly wrong. Mr. Justice . . . appears to have been misled

by the provisions of some English statutes, and he gratuitously supposes that the Indian Legislature must have been familiar with the various statutes and cases raked up by him;—page 527, ‘Indian judges in applying the English law concerning interest have considerably narrowed it. One or two rulings exhibit a very imperfect acquaintance with the English decided cases on the subject. The ruling in *I. L. R. 10 Calc. 1030* is diametrically opposed to the case of *R. v. Justices of Huntingdon*, 4 Q. B. D. 522;—page 654, ‘The direction in section 30 has been whittled away to such an extent that the words of the Legislature might as well have been “The Court shall not,” &c.;’—page 719, ‘The High Court apparently overstepped their powers in interfering in a recent case’ (not given) ‘from Cuttack;’—p. 517, ‘This ruling appears to be a mere *apex juris*, and is utterly opposed to the clear intention of the section;’—page 70, ‘The judgment of . . . reads like a schoolman’s quibble;’—p. 304, ‘The Court of Cassation do not let off the accused altogether, as High Courts in India frequently do;’—page 368, ‘This ruling is absurd;’—page 90, ‘This last ruling is quite indefensible.’ ‘These rulings are reasonable and no doubt sound law, but they are simply farcical in the light of the other rulings.’ ‘Recent rulings of the High Court exhibit a tendency to veer round and to avoid the absurdities caused by making and adding to the statute law instead of merely interpreting it.’ ‘This is the result of the case law, which has added something to the Penal Code which was not in it before.’ ‘All these rulings are antagonistic to specific provisions of the Procedure Code.’—The possession by Mr. Phillips of every qualification in which he shows himself wanting for the task which he has undertaken, would yet fail to atone for the bad taste of this style of criticism. One result of his selecting for his annotations those cases which he considers open to criticism is that important points have been neglected, and the reader looks in vain for information which a very pretentious preface might induce him to expect that he would find.

A favourite assumption throughout the book is as to the ignorance of Indian judges—for example, page 70, ‘The judges who gave the above ruling were evidently not aware, &c.’ (here he overlooks an alteration of the law by the Legislature);—page 469, ‘But the Calcutta High Court really appear to have been unaware of their previous practice, as disclosed in the Bengal Law Reports and the Weekly Reporter. Had they been aware of the previous case law, their ruling would probably have been different;’—page 79, ‘Had Mr. Justice . . . known the previous case law, he would probably have held a different opinion;’—page 174, ‘Had the judge been acquainted with the decisions of learned English judges *in simili materiâ* (*sic*), his exposition of the law could not have been so unsound.’ But he tells us at page 226 that ‘the importation of English decided cases has had the result of defeating the intention of the framers of the Penal Code.’ As might be expected, when Mr. Phillips imputes ignorance to Her Majesty’s judges in India, he overlooks some essential point, or totally fails to understand what he presumes to criticise.

The ‘strength of mind’ with which he has armed himself for the purpose of influencing the courts, the administration of justice, and the action of the Legislature, carries Mr. Phillips in his career of criticism even beyond the decisions of Indian judges. He points out that the Penal Code contains a good many instances of pleonasm (p. 14), though he is elsewhere pleased to express his approbation of this piece of legislation, telling us (p. 223) that the remark as to its being too wide and comprehensive ‘is generally made by those who have but a very slight knowledge of the English law and none

at all of the continental Penal Codes.' He criticises the best work that has been published on the Code of Criminal Procedure (and which has passed through repeated editions), and assures us that the contrary of what is there stated is sound law: and still nothing if not critical, he favours us with his opinion upon English cases (p. 210), some of which he considers very harsh. The field of decided cases being too limited for his comprehensive survey, he suggests what should be done with Brahmin bulls and with the men of low caste, who collect the hides of animals. He points out (p. 386) how magistrates may render themselves liable to punishment under the Penal Code by weakly yielding to the arguments of pleaders, to whom he seems to have a strong antipathy. He gives us his views (p. 156) upon the importunities to which widows are subject in Bengal and in Burmah (the record of his services does not show that the field of his experience extended to this latter province); treats us to anecdotes of what has occurred in districts where he has been employed; and favours the Government of India with his earnest conviction as to who should be appointed to high judicial office in that country. Where more detailed information would occupy too much space, he refers his readers to his book on *Comparative Criminal Jurisprudence*—a work which we labour under the disadvantage of not having seen or indeed heard of. Equally conversant with the practice of the courts in England and in India, he informs his readers (p. 687) that 'the judges in England do not permit counsel to put forward hypothetical defences unsupported by the evidence' (he had evidently been reading the trial of Joey Rushbrook in *The Poacher* by that amusing naval novelist, Captain Marryat); and that 'the tendency of Civil Courts in India nowadays is to reject all evidence of custom or general right' (p. 666). He does not tell us what has been his experience of Civil Courts in India, and the record of his services is equally silent. He is therefore, of course, more excusable for his ignorance on this point than the judges who might be expected to know something of the law which they were appointed to administer. If, however, we might make a suggestion, there is some risk in making categorical assertions not based on actual personal knowledge. For example, his observations about Jury Districts, in which cases are 'chucked at' the Sessions Judge (p. 366), are as incorrect as inelegant, and must be offensive to native gentlemen who serve on juries, unless they have the sense to overlook them as coming from a gentleman who never presided at a trial by jury in his life. Again, he states in his preface that Indian judges are not bound by previous decisions in the same way that their English brethren are; and he supports this statement by saying that he knows one or two English lawyers who have been much struck by this fact. An assertion more incorrect or misleading it would not be easy to make. In every case in which a Division Bench of a High Court sees reason to differ from a previous decision of another similar Bench, a reference is made to a Full Bench consisting generally of five judges, in order to ensure uniformity of decision in the same Court.

Mr. Phillips is profuse with advice to magistrates of a doubtful and dangerous kind. At page 314 he warns them against being misled by two decisions of the High Court which he characterises as doubtful. At page 193, in opposition to the decision of another High Court, he advises a conviction in a case in which the person concerned refuses to make a complaint, although the law forbids a charge to be proceeded with in such a case without the complaint of this person. Then false complaints are very common in India, and the Legislature and the Superior Courts have made many efforts to check them. In a country where perjury is too common, and false witness may be hired on easy terms, there is however always the danger that

a man who brings a true complaint may have the tables turned on him, and, to the delight of the really guilty party, be punished for a complaint as false which is really true. In order to prevent a result so detrimental to the best interests of justice, the High Courts have strongly impressed upon magistrates the advisability of giving a complainant every reasonable opportunity of proving his complaint before he is himself put in the dock upon a charge of having made a false complaint, the very conversion of a complainant into an accused being too often sufficient to close the mouths of timid Indian witnesses, who imagine that the magistrate has in his own mind decided the case and that they may get into trouble by coming forward to give testimony in support of the original complaint. Above all, the High Courts have set their faces against complainants being converted into accused upon the inquiry and report of the Police, pointing out that by so doing magistrates really delegate their judicial functions to police officers, a course the danger of which has been demonstrated by repeated experience in India. Mr. Phillips, however, in his superior wisdom thinks differently, and in his usual tone he says (page 91):—‘It is absurd and illegal for a magistrate to summon witnesses when he is satisfied that a charge is false; and he can be so satisfied on the perusal of the record of investigation by a police-officer.’ There may be magistrates who will take Mr. Phillips’s wisdom at his valuation, putting it above that of thirty High Court judges and the distinguished lawyers who have given us the Indian Codes, but we apprehend that magistrates in general will follow the safer course of being guided by the decisions of the Court to which they are subordinate.

Mr. Phillips is fond of using native terms, which must be unintelligible to many of his readers. This practice has been prohibited in official correspondence, and is discountenanced by the best Indian writers. Then he quotes cases, not by the names of the parties, but by a mere reference to the number and page of the Reports in which they are to be found. This, besides being inconvenient in other ways, precludes the compilation of an Index of Cases, which is an indispensable portion of a good law-book. The Index of Contents annexed to his work is a mere apology for an index. Our opinion of the value of the annotations has already been expressed, and whatever value the compilation might have possessed as a handy collection of the text of the Acts most frequently in the hands of magistrates, is marred by the want of a proper index. Mr. Phillips tells us in his Preface that the manuscript of this edition was ready some years previously, but that ‘the edition never appeared owing to circumstances over which I had no control.’ We cannot help thinking that it would have been better if the edition had in truth never appeared.

Mr. Phillips is a young member of the Bengal Civil Service, and apparently not without some ability; but he seeks to instruct while he has yet to learn, and this book is a strong instance of the danger of putting young men into posts of authority and responsibility before they are fitted for them by completed education and some little experience of the world. We doubt if the spectacle of a young and headstrong civil servant, who will not tolerate the arguments of pleaders before him or be guided by the Superior Courts above him, and who openly incites other officials to similar behaviour, is calculated to lessen the popular cry in India against ‘Boy-Magistrates.’ If argument were wanting, this book supplies a very strong argument, in favour of raising the age at which young civil servants are sent out to India, and are under the existing system almost immediately placed in responsible positions.

C. D. F.

The Theory of Law and Civil Society. By AUGUSTUS PULSZKY. London : T. Fisher Unwin. 1888.

THIS work contains the substance of several courses of lectures delivered by the author during the last ten years at the University of Budapest, and was originally published last year in Hungarian. It is now reproduced in English for the purpose of securing for it a wider circle of readers, and the choice of our language, we are told, is meant to mark the author's indebtedness to the assistance he has derived from English writers on philosophy and law, chiefly Herbert Spencer and Sir Henry Maine. It thus becomes in turn our duty and also our pleasure to acknowledge the compliment which Professor Pulszky pays us, and to recognize that he has presented the general results of theoretical jurisprudence both here and on the Continent with a completeness and lucidity far exceeding anything that has been attempted hitherto. At the same time his book is not easy reading, and the English student will not get far unless he is prepared to give up the special ideas of jurisprudence as developed in England, and extend his sympathy to the very different, and as is often thought very vague and unpractical, notions of continental jurists. It must be remembered, however, that the book deals essentially with general theories of the state and of law, and that the ideal claims in its pages as much attention as the practical. Its special method, indeed, is that it chooses ideals as the surest guide to the nature of the societies which pursue them, and the author claims this as being the most original part of his work.

Beginning with a general classification of all sciences, and a discussion of the method most suitable for the social sciences in particular, the author marks out the several spheres of ethics, of political economy, and of the philosophy of law and civil society. Confining himself then to this last, he discusses the various theories which have been formed of law, according as it is based on the divine law, the law of reason, or the law of nature. In connection with these we have one of those general reviews of all ideas on the subject, ancient and modern, which, for their learning and clearness, form not the least valuable portion of the book. The author himself has no hesitation in founding everything on actual experience as opposed to theological or metaphysical grounds, and he finally sums up the only useful conception of the law of nature in the definition that it is 'a summary of those laws which, taking into account all the factors of human activity, may be ascertained as being the conditions of social co-existence in all its phases and forms' (p. 82). This introductory portion is then concluded by an account of the different divisions of law, and the author discusses the unduly prominent part which private law has always assumed, and points out that many of the features in the development of all law may now be studied in connection with international law. The course he is going to pursue is then defined by the following series of ideas—society, the state, objective law, subjective rights.

It is in the next section, which deals with society, that the author develops the theory of aims or ideals to which we have already called attention. Men living in society with some definite and important aim, or prompted by some vital interest, form an organic society. In this the natural selfishness of man is tempered by the necessity for co-operation, and the final result is self-sacrifice and public spirit. Such a society, however, is by no means identical with the state. It becomes a state, indeed, so soon as it is conscious of the laws of its existence and is able to enforce them, that is, so soon as it becomes dominant. But such societies are continually following

each other ; some are pressing forward into power ; one is actually dominant ; while others that have passed that stage, and have obtained the satisfaction of their aims, are now content to live under the protection of the society for the time being dominant. Thus briefly stated the theory may seem fanciful, and we are inclined to suspect that it is worked out with an elaborateness which has no corresponding basis of fact. It is impossible now, however, to do more than point out its main features. Accordingly the various societies whose growth is depicted, and each of which has its own definite aim, are enumerated as the society founded on kinship, the society founded on local contiguity, the society of conquest, the society founded upon religion, the society founded upon nationality, and beyond this a society founded on the highest humanitarian interests and which is destined to be universal. The rise of each of these societies successively into power is first described generally, and then the author's conclusions are illustrated by history. It would have been better probably if some of these illustrations had been introduced earlier, and we should thus have seen more clearly the ground of the author's generalizations in regard to the succession and mutual relations of the societies as above distinguished. For want of this the treatment suffers sometimes from a sense of unreality.

Having thus dealt with societies in general, the author next devotes himself to that one which is for the time being dominant, viz. the state ; and this is fully treated as to its nature, its origin, and its aims. The elements essential to it are consciousness of aim in its members, capacity for public spirit, and power to enforce its will. These are well brought out in the following passage :—

'Whenever the members of the state become deficient in the consciousness of the aim of the community, to a degree incompatible with the maintenance of the state ; whenever the readiness and ability for sacrifices die out within them, and whenever the state itself is no longer able to assert its will, to direct the activity of its organs, lacks coercive power, and becomes in fact unequal to the sphere of its existing society, it then falls to pieces and ceases to be a state' (p. 229).

Chapter x. contains a very full and valuable account of the various theories of the origin of states, although it might well have been supplemented with some of the more recent results of Sir Henry Maine's investigations. All the *a priori* theories, especially that of contract, are well expounded, but for actual historical results reference is only made to Savigny and the German historical school, though it is very doubtful how far their work really gives them any claim to the title.

In considering the aims of the state and consequently the limits of state interference, we are brought back to the theory of vital interests, it being necessarily the aim of the state to make its members conscious of its own vital interest, and to obtain their co-operation in securing it ; and it is pointed out how the actual business of the state depends upon the extent of this consciousness and the willingness of its members to co-operate. Remembering that the greatest results are always produced by spontaneous activity, the mean has to be struck between interfering with individual enterprise on the one hand, and the undue self-effacement and loss of power and influence by the state on the other. In all this part of the book there is much interesting and weighty matter, and the author handles his subject with fulness and lucidity.

Finally, Professor Pulszky discusses law and right, adopting the view which has been advocated in opposition to Austin, that subjective rights must be conceived of as arising independently of law, being indeed ultimately

confirmed and controlled by law, though not always created by it; and that coercion is not an element of the first order in the idea of law, though it is always inseparable from it. Law in his final analysis is 'the sum of those rules which embrace the actual conditions of existence of the society, recognized by the state and which can be enforced by the state' (p. 325). It must be confessed, however, that in the absence of the Austinian test, the distinction which is drawn between law and morality is somewhat vague, and there are obvious objections to the proposition that morality concerns the internal state of the individual, and law his external activity. There is no doubt that actual law can be only ascertained in our own days by enquiring what the state will enforce, though much else has to be taken into account when we are considering what laws the state ought to enforce, and also why, though endowed with unlimited power, it consents to be bound by its own laws. Professor Pulszky has perhaps hardly allowed enough weight to the very clear way in which this is dealt with by Ihering in his *Zweck im Recht*.

The basis of law and right is dealt with at length, and we have an able discussion, among others, of the theory of utility. This, however, is rejected on the ground that, while pretending to settle everything by exact measurement, it contains elements incapable of measurement, and also fails to account for the sacrifice of present individuals for the sake of future ones; and the author substitutes for it the simple principle that law should be so established as to secure to every individual the widest and most unrestricted sphere for his own activity. The passage in which this is summed up gives a good example of the author's style:—

'And since that state possesses the most perfect organism, which allows freedom to the greatest mass of individual forces and least requires to maintain order, and which, besides, employs force only where the voluntary co-operation of the individuals and of subordinate societies cannot, owing to lack of consciousness or of discipline, be obtained; that system of law and right must also be acknowledged to be most perfect, in connection with which the greatest amount of individual activity can be asserted at the least expense of the activity of the state, and under which activity in general is most available, the use of forces most economical, and thus that activity which is directly employed to satisfy actual wants is the greatest, whilst the relatively smallest portion of the whole sum of forces is consumed in the assertion and production of the consciousness and will of the community' (p. 378).

The book concludes with a description of the actual development of law, and the growth and influence of custom is very fully dealt with. It should be noted that Professor Pulszky seems to judge Sir Henry Maine's views by his treatment of *Themistes* in 'Ancient Law,' although in later editions he pointed out that his views were essentially modified in his later works, after he had had an opportunity of studying the influence of custom in village communities. It is satisfactory to note the author's opinion that upon the Continent codification has not interfered with the further development of the law.

In conclusion, we may remark that Professor Pulszky seems to be the first continental jurist who has allowed at once for continental and English work in jurisprudence, and the value of the book consists largely in the breadth of view and fulness of knowledge with which he approaches his subject. With regard to that portion to which he attaches most weight, the discussion of human aims and the corresponding arrangement of successive societies, we do not feel inclined to pronounce a decisive judgment. As we

have intimated, there is much in it both to mystify and to interest. Perhaps at some future time the author will develop this idea in greater detail, and in such a manner as to make its application to actual history more clear. The rest of the book, however, is abundantly valuable, both for the way in which many of the most important controversies in politics and jurisprudence are summarised and elucidated, as well as for the ability which the author has himself shown in the solutions he proposes. J. M. L.

A Treatise on the Law and Practice relating to Vendors and Purchasers of Real Estate. By the late J. HENRY DART. Sixth Edition. By WILLIAM BARBER, Q.C., R. B. HALDANE, and W. R. SHELDON. London: Stevens & Sons. 1888. 2 vols. La. 8vo. ccciv and 1669 pp.

THE publication of a new edition of this valuable work was announced in the April number of the LAW QUARTERLY REVIEW. We propose on this occasion to enter more into the details than was at that time possible, with a view to enable our readers to estimate the relation of the present to former editions. The labour of preparing a new edition, necessarily very considerable in the case of a work of this kind, has been much augmented, not only by the usual burden of a great number of newly-reported cases, but also by the extraordinary legislative activity of the last twelve years, which have been unusually fertile of statutes directed towards the subjects with which the work is especially concerned. This fact will sufficiently appear from the mere mention of the Settled Estates Act, 1877, the Partition Act, 1876, the Conveyancing Acts, the Settled Land Acts, the Married Women's Property Act, 1882, and the Yorkshire Registry Acts; to which may be added the Judicature Acts and Rules. Besides the large amount of additional matter which has necessarily been gathered into this edition, we observe that it is honourably distinguished by greater attention to and a wider grasp of general principle than was to be found in its precursors. As a favourable example of this treatment we would refer to the discussion in ch. i. sect. 3 (p. 35) on persons who are relatively incompetent to purchase, and particularly as to the disability affecting persons who stand in a fiduciary position. The distinction between cases in which the disability flows rather from the peculiar nature of the authority of the vendor, as disabling him from selling to himself, and those in which it flows from the fiduciary relation borne by the purchaser towards the vendor, is at least highly ingenious, and perhaps affords a clue to disentangle a maze of authorities. There may be some doubt whether all the cases can be reconciled with the principles laid down by our authors; but the hope is reasonable that greater certainty and perspicuity will be found to follow upon a very laudable attempt to supply a guiding principle where one is much needed, and the attempt cannot fail to supply at least a basis for discussion. At pp. 68, 69 will be found some good remarks upon the intrinsic validity, and the valid exercise, of powers contained in settlements, which are not expressed to be restricted, as to their execution, in point of time. Attention may also be directed to the statement at p. 408 *et seq.*, of the rules relating to the implied grant of easements upon a severance of two tenements in the same ownership: a subject upon which some fresh light has been thrown by the important case of *Birmingham Banking Co. v. Ross*, 38 Ch. D. 295, reported since the publication of the work; and in connection with this subject, the remarks at pp. 412, 413, upon the so-called ways of necessity, may be noticed for their terseness and precision. A very interesting discussion will be found at p. 464 *et seq.*, of the difficult questions relating to the rights acquired *inter*

as or against one another, by several persons under the statutes of limitation, who, without mutual concert, have at different times kept a rightful owner out of possession during successive periods, which suffice when added together to cause the statute to take effect. Some fresh light may perhaps be thrown upon these questions by a recent decision of the Privy Council, at present unreported, in an appeal from the colony of New South Wales; which is likely, when it is given to the world, to afford material for much discussion and perhaps to be the occasion of some difference in opinion. In noticing the remarks at pp. 716, 717, as to the effect which the appropriation of the purchase-money may have upon the vendor's right to demand interest pending completion, we may observe that in l. 10, p. 717, the word 'not' has by inadvertence been omitted from a context where its presence is as necessary as in the Seventh Commandment. The remarks on the influence of mistake upon the contract, at p. 839, are well worthy of notice; as also are those at p. 855 on the distinction between the right and the remedy, in the case of a voidable transaction. In the treatment in sect. 4 of ch. xiv. (pp. 862-877) of the vendor's remedies on the purchaser's covenants, which involves a good deal of consideration of 'covenants running with the land,' whether at law or in equity, full advantage has been taken of the new light thrown by the cases of *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403, and *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562, upon the doctrine of *Tulk v. Moxhay*, 2 Ph. 774; but we feel some doubt whether it is necessary, in order to explain the last-mentioned case, to state that the covenant 'was affirmative in its terms but was held to imply a negative.' In the first place, a covenant to keep a piece of ground, *inter alia*, 'uncovered by any buildings,' seems to contain a negative without any help from implication; and in the second place, we think that the distinction between covenants which are, and covenants which are not, enforceable in equity, is to be found rather in the use of the word *restrictive* than in the use of the word *negative*. The doctrine that an affirmative covenant implies a negative, might without any difficulty be pushed to dangerous lengths; and indeed, when once that doctrine is admitted, it becomes a mere question of caprice where the line shall be drawn, or whether any line shall be drawn at all: a covenant to build a house implies a covenant not to leave it unbuilt. To put this conclusion into other words, instead of saying that the covenant in *Tulk v. Moxhay* was affirmative in form, but implied a negative, we prefer to say that it was partly affirmative and partly negative, and that the decree dealt only with the negative part. In quitting this subject, we might express an opinion, that the treatment of the doctrine of covenants which run at law, as distinguished from equity, is somewhat lacking both in fulness and in precision; and though we agree, on the whole, that 'by the common law the burden never runs [with the land, i.e. as the context shows, the fee simple] in any case,' yet it might be noted that in the *Mayor of Carlisle v. Blamire*, 8 East 487, the Court of Queen's Bench evidently assumed the truth of the contrary doctrine: see in particular p. 497. We should not, however, omit to draw attention to the merits, in sect. 6, pp. 898-900, of the treatment of the distinction between the right to rescind a contract before completion, and the right to have the transaction set aside after it has been completed.

A subject of the first importance, the protection afforded by the legal estate to a purchaser for value who has acquired it without notice of the existence of any opposing equities, is treated with great originality and clearness in chap. xv. sect. 1, pp. 927-941. Want of space obliges us to refrain from criticising details, and we can only touch upon the case of

Ind Coops & Co. v. Emmerson, 12 App. Cas. 300, which was decided too recently to permit any adequate treatment of it in the pages now under review (see p. 941 and Appendix, p. 1357). That case has decided, as our readers are aware, and it must now be taken for settled law, that the plea of purchase for value without notice is no longer available as a bar to discovery. That decision was, we believe, contrary to the general opinion of the profession; and it is a curious circumstance that, to the best of our recollection, the view which has at length been established by the House of Lords was hastily advanced in a new edition of a legal work of some repute published very soon after the passing of the first Judicature Act, where it met with a good deal of ridicule, and was withdrawn on the publication of a subsequent edition. Though the decision of the House of Lords must silence dissent, it may perhaps not always convince the judgment; and a careful reader of the case may feel some suspicion that the reasons alleged in its favour are neither very well conceived nor very well expressed, and fall somewhat short of the most convincing argument that might by possibility have been framed.

At p. 950 *et seq.*, we find an excellent discussion of a cognate subject—the liability of a purchaser to lose the advantage afforded by his possession of the legal estate, if he has been negligent in enquiring after, and obtaining delivery of, the title deeds. Particular attention may also be directed to the improved treatment of constructive notice to the purchaser by means of notice to his solicitor (p. 988); and to the discussion of the doctrine laid down in *Price v. Jenkins*, 5 Ch. D. 619, that the liability which, in theory at least, must always attach to a leaseholder, will, in every case, prevent a voluntary settlement of leaseholds from being avoided, under the statute of 27 Eliz., upon a subsequent sale for value by the settlor. The editors are dissatisfied with that decision, and not unreasonably. But it must not be forgotten that the construction of the statute against which the somewhat absurd decision in *Price v. Jenkins* is a protest, was itself an absurdity, and that the two absurdities neutralize one another and effect a return to common sense.

To the foregoing remarks we might add many others, by way of indicating passages which show signs of the careful attention of the present editors; but it is useless to indefinitely multiply references of this kind. We will only add, that chap. xiv. sect. 3, on the vendor's right of preemption under the Lands Clauses Consolidation Act, 1845, chap. xix. sect. 1, on sales by the Court under the Settled Estates Act, 1877, and sect. 3 of the same chapter, on the Partition Acts, 1868 and 1876, appear to have been entirely rewritten. The last-mentioned section contains what is perhaps the best summary in existence of the provisions of the Partition Acts and the mode of procedure under them, and appears to omit none of the decided cases. At p. 1295 a valuable list is given of the various circumstances under which the procedure of the Settled Estates Act is still practically useful.

A critical eye might of course detect points at which further improvement might still be possible. The consideration, at p. 229, of *Walsh v. Lonsdale*, 21 Ch. D. 9, is somewhat perfunctory, and the space devoted to it less than its importance (perhaps for evil rather than for good) seems to demand. The *quaere* in note (f.), p. 231, as to whether the actual deposit of title deeds is a part-performance sufficient to take a case out of the Statute of Frauds, seems to be superfluous, because there is, we believe, no doubt that the Statute does not apply to such an actual deposit, and the assistance of the part-performance doctrine is not required. At pp. 289, 290, some curious language is cited from the Intestates Estates Act 1884, 47 & 48

Vict. c. 71, apparently without any consciousness that it contains anything odd or calling for explanation. At pp. 292, 293, where we find the subject treated of disclaimer by a trustee in bankruptcy, we do not also find any discussion as to what is meant by not affecting the rights or liabilities of third parties; but in the absence of decided cases on the point (see now *Ex parte Shilson, In re Cock*, 20 Q. B. D. 343), this was a very pardonable omission. In discussing (pp. 294, 295) the relation between sect. 4 of the Conveyancing Act, which empowers the personal representatives to convey freeholds which at the death of a vendor are subject to a contract for sale, and sect. 30 of the same Act, by which estates of inheritance or *pur autre vie* vested in a sole trustee or mortgagee are made to devolve upon his death to his personal representatives, the editors rightly, as we think, hold that the trust for the purchaser which is created by a contract for sale is not a trust within the meaning of the last-cited section; but they seem somewhat to have misapprehended the import of sect. 4, apparently supposing that it would or should be generally used under such circumstances. There can, we think, be little doubt that it was meant to be used only in cases where the legal estate either is limited in strict settlement by the vendor's will, without any sufficient power enabling trustees to convey, or descends to an heir at law subject to some disability, such as infancy. The suggestion that the purchaser ought to preserve the contract, or evidence of it, as a necessary part of the title, seems to be sound; and in such cases a recital of the circumstances should be inserted in the conveyance. The remarks at p. 467, on the application of the Statute of Limitations between lord and copyholder, usually symbolised by the case of *Walters v. Webb*, L. R. 5 Ch. 531, wear, perhaps, a somewhat meagre appearance; but it may be doubted whether more could have been said, except by way of conjecture. At p. 622, treating of limited covenants by fiduciary vendors, we think that on the question, whether trustees should be required to give an 'undertaking for safe custody,' something might with advantage have been said in addition to, if not in substitution for, the reference to an article in '29 Sol. J. 215.' *Sed hæc sunt nugæ*, and we break off our list of cavillings with the expression of a hope that the reader will have thought our praise more solid and more hearty than our blame.

The personal appearance of these volumes is such as to make it a pleasure to consult them, and the list of *addenda* shows by its commendable brevity (when compared with the size of the work) how well the text must have been kept in hand down to the moment of publication. We regret, indeed, that the abbreviations used in references have been subjected to a somewhat excessive clipping. In the Preface this is said to have been done 'for the sake of brevity, and in order to confine as far as possible the dimensions of the book;' but we think that this shows some misunderstanding of consequences. To cut down 'Beav.' into 'B.' has rarely any tendency to shorten the book, and commonly shortens only the last line of the paragraph in which it occurs. A complete list of abbreviations, with their extended meaning, is indeed given; but to refer to lists is a nuisance, and the look of the things themselves is something of an eyesore in so handsomely printed a work. In the list, too, we think that the arrangement would have been more convenient if it had been strictly alphabetical, instead of having the reports placed in a bunch together before the other authorities and text-books. But for the copious and excellent index we have nothing but praise. We have been informed that an authority of the highest eminence has pronounced it to be the best in any existing law-book, and we humbly concur in that opinion.

H. W. C.

A Bill intituled an Act for codifying the Law relating to the Sale of Goods. (Lord Herschell.) 1888. H. L. 267.

THIS Bill is intended to do for the law of sale of goods what the Bills of Exchange Act has done for the law of negotiable instruments, and, as the introductory Memorandum explains, is drafted on the same lines. It seems neither hazardous nor indiscreet to infer that it comes from the same hand: but any reader who thinks otherwise may, if he pleases, read 'the draftsman' for 'Judge Chalmers' in the following remarks.

The object is expressed to be 'to reproduce as exactly as possible the statutory and common law rules relating to the sale of goods, leaving any amendments that may seem desirable to be introduced at a later stage.' Accordingly we get not only the 17th section of the Statute of Frauds, exposing, as the biographer of Chunder Mookerjee would say, its *cui bono* in all its naked hideousness, but those remarkable enactments of their late Majesties King Philip and Queen Mary 'against the buying of stolen horses,' with the supplementary Act of Elizabeth 'to avoid horse stealing,' about the only example of any legislation of 'your Highness' sister, the Lady Mary' having been confirmed under Elizabeth. These would probably be the first sacrifice demanded by the modification of the Bill (at present only hinted at as possible) to make it applicable, like the Bills of Exchange Act, to Scotland as well as England. In this case the adaptation would be less easy, for the whole policy of the rule as to market overt would have to be considered. Either the law of Scotland would prevail, and the rule would be abolished, or the English rule would have to be not only confirmed but extended. The latter course would be in agreement with modern Continental legislation. On the passing of property there would be little trouble in assimilating the Scottish rule to the English: the practical difference is already slight, and under the modern French law, founded on Roman law though it is, property passes by the contract without delivery. It has been suggested that the framers of the Code Napoléon did not understand the Roman law. This however is a matter of mere curiosity at the present day.

But our first concern is with the workmanship of the Bill as a codified statement of English law. Many of our readers will be aware that this part of the law has already been codified in British India, where the Contract Act contains a pretty full chapter on Sale of Goods. Judge Chalmers appears to have consulted the Indian Contract Act, but his work is quite independent in arrangement and general design, and the language of the Indian Act is called to mind only by two or three clauses. His arrangement is decidedly more clear and logical, and his treatment of details is both more complete and more exact. Whether this Bill does or does not become law, the attention of the Government of India should be directed to it with a view to the revision of the Indian Contract Act which will sooner or later be called for, and which, when undertaken, ought to be so thoroughly performed as to last for another generation. The Bill is arranged in six parts: 1. Formation of the Contract (including the rules as to conditions and warranties); 2. Effects of the Contract (as to transfer of property and title); 3. Performance of the Contract (delivery and acceptance); 4. Rights of unpaid seller against the Goods; 5. Action for breach of the Contract; 6. Supplementary.

Although the sale of goods is a fairly self-contained chapter of the law of Contract, it offers not a few troubles to the codifier in the shape of complex legal ideas of more general scope which have to be assumed as known.

Here we read in the interpretation clause that 'delivery' means transfer of possession actual or constructive from one person to another. This is perfectly correct, though it would be not less correct, nor, I think, less clear, if the words 'actual or constructive' were omitted. Moreover Judge Chalmers is right in holding it not to be the business of a Sale of Goods Bill to explain what either actual or constructive possession is. For a lay reader, nevertheless, the definition goes near to be *obscurum per obscurius*, and even for most lawyers at most times it is rather a finger-post to interpretation than interpretation itself. In dealing with the specific rules of the subject-matter Judge Chalmers gives more express weight to the intention of parties than the Indian Contract Act, and makes it clearer that the minor rules are only in the nature of presumptions, and will yield to a different intention when such intention appears. This is certainly according to the letter and the spirit of English authority.

Commercial lawyers are familiar with the sorely vexed question as to the effect of partial breaches of contract when there is a contract for delivery by instalments. Judge Chalmers, faithful to the principle of making the first draft a simple reproduction of the authorities as they stand, does not commit himself to any theory. 'It is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to rescind the whole contract.' The law cannot rest there, nor would the enactment of the clause in this form appreciably check its development. Meanwhile this cautious acknowledgment of an unsolved difficulty may be taken as an example of the contrast between the practical codifier and the vague enthusiasts of codification. Some persons dream of a Code that would at once supersede all the reports and all the classical treatises. There are two ways of cherishing this imagination. One, and the better, is carefully to abstain from trying one's own hand at the codification of any particular topic. The other is to plunge into codification with a light heart, being chiefly careful to know so little law that one runs no risk of ever understanding what a bad piece of work one has done.

Minute verbal criticism is hardly in place at this stage: it seems undesirable, however, to introduce Latin phrases like 'prima facie' into an English Act of Parliament, and some few sentences, such as 'Reasonable time is a question of fact,' might be made more elegant even at the cost of a few more words. Unless we have overlooked something, the word 'representative' is used in one place (cl. 33) with an extended meaning which ought to be defined. In the main the Bill may be accepted as a good solid foundation.

F. P.

Select Pleas of the Crown. Vol. I, A.D. 1200-1225. Edited for the Selden Society by F. W. MAITLAND. London: Bernard Quaritch. 1888. La. 8vo. xxx and 164 pp.

THIS volume consists in the main of most excellent work done by Mr. Maitland, but also contains a document of a different character for which he is not individually responsible.

Let us, however, look at the bright side first. Mr. Maitland, some years ago, set himself the task of collecting specimens of the earliest Pleas of the Crown, and published those of the County of Gloucester for the year 1221. He now continues his undertaking, selecting the cases which he considers

the most important from all the rolls he is able to find, without regard to county.

The execution is in every respect worthy of the design. The text is not that abbreviated Latin which can never be reproduced with perfect accuracy in print, and which when reproduced is often but a transparent cloak for want of scholarship. It is the Latin of the period with all the words (except English names of persons and places) written in full. Even this of course presents some difficulties to good classical scholars, but Mr. Maitland has given on the opposite page a translation into most appropriate and most vigorous English. Every one, therefore, who wishes to know what our early Pleas of the Crown are like, can learn with the greatest ease.

In these records there is to be found much that was known before. The insecurity of life and property, the astonishing number of murders in proportion to the population, and the fact that when any one was appealed of homicide, mayhem, or robbery, he usually escaped punishment, are not now revealed for the first time. Still, even these matters are illustrated with a richness of detail which only the rolls themselves can afford. There are, however, other lessons to be learned from the minute particulars which appear in a comparatively large number of documents relating to a short period, and they are lessons of great value for the history of the law.

The earliest of the cases now published by Mr. Maitland occurred about nineteen years before, the latest about six years after the abolition of Trial by Ordeal. These few years are necessarily of great importance in the history of Trial by Jury, because, in the end, the jury took, in criminal matters, the place which had been previously occupied by the ordeal as well as that which had been previously occupied by the judicial combat or duel.

It is interesting to notice that, in appeals, the trial by battle was giving way to the trial by jury before even the ordeal was abolished. Thus in one very remarkable case (No. 64) of the year 1203, an appellee, instead of accepting the wager of battle, successfully offered the King one mark of silver to have an inquest of lawful knights to make known whether he was guilty or not. The jurors found that they did not suspect him. Their finding was supplemented by certain facts which the county recorded, and thereupon he had judgment to be quit. There are also other cases in the volume of even earlier date which show that the idea of an 'inquest' as to fact in a criminal trial was becoming familiar, and that, too, beyond the limits of the towns which were by charter exempt from the trial by battle.

The 'inquest,' however, by itself, seems not to have been always conclusive. There is a case in the volume (No. 100), in which an appellee was acquitted by five inquests in respect of the same charge, and then offered fifteen marks to have a sixth. The first of the five was held by direction of the Justiciar with the object of deciding whether the appellee should remain in prison or be let out on sureties to abide the coming of the Justices in Eyre. The second, however, gave a verdict of Not Guilty in the Eyre. The third did the like at Westminster, the fourth again in the Eyre, and the fifth again at Westminster. Something more, however, was required, as in the above-mentioned case (No. 64), before he could go quit. The end does not appear.

Where there was a presentment of homicide by jurors there appears to have been only one mode of exculpation—the ordeal, until the ordeal was abolished. It seems, however, to have been usual, if not necessary, that oath should be made on behalf of the four neighbouring townships in confirmation of the presentment, and this was the only protection which the accused had against the ordeal. After its abolition some form of jury comes in, apparently the same (as Bracton has said), either wholly or in part, as

that which made the presentment or indictment. But here again, as in case of appeal, it is not clear that the accused went quit upon acquittal by a jury alone. Thus in case No. 170 the jurors found a man not guilty, and stated certain details. Then, it seems, 'the King's serjeant who took him said the same,' and so it was considered that he should go quit.

These Pleas of the Crown are full of interesting and valuable matter of the same kind, showing in what way our rude forefathers attempted to ascertain matters of fact. The production of suit, the wager of law, and even the examination of individual witnesses in appeals, are all illustrated in these rolls, for printing which, and for the manner in which he has printed them, Mr. Maitland is heartily to be thanked. To crown all, there is an excellent index of matters as well as an index of persons and another of places. As gratitude is a lively expectation of favours to come, the next instalment of the good work will be anxiously awaited.

Though, however, the Selden Society has been supremely fortunate in securing Mr. Maitland as an editor, it has not been equally happy in the very lengthy statement of its objects which appears at the end of the volume. If this remarkable document were to be accepted literally, it would imply that the Society proposes to take under its management nearly the whole of the records which are in the custody of the Master of the Rolls, and many other things besides, including a 'Dictionary of Anglo-French.' Everything that has been well done is, it seems, to be better done—from the editing of the *Ancient Laws and Institutes of England*, down to Sir F. Palgrave's excellent calendar of the *Baye de Secretis*; and everything that has not yet been done is to be done. The authors of this stupendous announcement would have inspired more confidence had they shown themselves to be a little more familiar with the nature of the early Assize Rolls, with the functions of the Chancery and their origin, and with the matters which appear on the various rolls of the Exchequer. They have, it seems, discovered that the pleadings in actions commenced by writ of *Quo minus* are to be found on the Remembrance Rolls of the King's Remembrancer and not on the Plea Rolls of the Exchequer of Pleas, and that the Plea Rolls of the Exchequer of Pleas are our chief sources of information with respect to 'actions relating to real property and tithes.'

The motto of the Selden Society is :—

περὶ πάντος τὴν ἐλευθερίαν,

and a very free hand is shown in this composition. But it may, perhaps, be asked whether a better motto would not have been :—

περὶ πάντος τὴν ἀλήθειαν.

L. O. P.

[Selden's own motto is good enough for us, and therefore we print without alteration or omission what our learned contributor has written. But we claim a little editorial freedom in turn. Why is not Selden's motto good enough for the Society which, however imperfectly, strives to carry on the work to which he pointed the way? Is not our learned contributor righteous overmuch in some other points of his minute criticism? Can he really believe that either Thorpe or Schmid exhausted the study of the Anglo-Saxon laws? Is not the 'tithes' in his quotation an obvious misprint for 'titles'? Anyhow, those who are familiar with the reports of the modern Chancery Division rather than with medieval rolls are not in much danger of thinking that prospectuses of any kind are intended to be 'accepted literally.']

The Montenegrin Code of the Law of Property. Tsetinje. 1888. Paris : Chamberot.

Le nouveau code civil du Montenegro. Par R. DARESTE. Paris : A. Picard. 1888. 8°. 15 pp.

Quelques mots sur les principes et la méthode suivis dans la codification du droit civil au Montenegro. Par V. BOGIŠIĆ. Paris : F. Pichon. 1888. 8°. 19 pp.

WE have received a volume, handsomely printed in the Cyrillic character, which, as we are informed and believe, is the Code prepared for the Principality of Montenegro by Dr. Bogišić. So far from not being finished, as a certain French traveller did vainly talk, it has been the law since the 1st of July. Though the original text is a mystery to us, we are to some extent possessed of its general character and contents through the kindness of the learned draftsman.

First, the Code is not a complete Civil Code: its title, as translated in French, is 'code général concernant les biens,' and it covers approximately the field of what English lawyers call Real and Personal Property. The arrangement is as follows:—

Part I. General and preliminary.

Part II. Of property and real rights.

Herein of acquisition, of rights between adjacent owners (in which trees appear as of singular importance), of servitudes proper, and of hypothec.

Part III. Of sale and the other chief kinds of contracts.

Here we have, in general, the familiar Roman or Roman-Napoleonic treatment; but there is a good local colour in the headings 'De la *supona*, c'est-à-dire des bétails de différents propriétaires envoyés en commun aux pâturages et dont le fumier est commun,' and 'De la *sprega*, c.a.d. des bœufs mis ensemble pour le labour.' Who knows but that study of these customs might help us to fill up our picture of the England of Domesday Book?

Part IV. Of contracts and obligations in general.

Part V. Of personal capacity.

This part is of special interest. Dr. Bogišić, as we mentioned in our last number, has abstained from codifying the customs which govern the internal order of the South-Slavonic family or rather house-community. But in relation to the outer world this community appears as a corporate person, the difference between its corporate property and the separate estate, *peculium*, or 'self-acquired' property of its individual members being carefully observed. The question of corporate or individual responsibility for wrongful acts of the members turns on considerations not unlike those which the Common Law has applied to a master's responsibility for the acts and defaults of his servants ('si l'intérêt de la maison, la défense de ses biens ou de son honneur a été la cause de l'action qui a porté dommage'). Let us hope that the Montenegrin tribunals will not be entangled in the same or similar refinements of 'mixed fact and law.' But they have (we believe) no juries; therefore no motions for new trials; therefore none of the blessings thereupon consequent.

We may mention here (though not in the order of the Code) that Montenegrin law has preserved, and the Code confirms, a modified rule *de migranti-bus*. A foreigner cannot acquire land at all save by grant from the prince; a Montenegrin can acquire a full share in the land of another clan or village, with the appurtenant rights of wood, pasture, and so following, only by purchasing as a whole the holding of a member who quits the community,

and by undertaking all the public burdens which in our own medieval language would be called *servitia*. It must be *idem tenementum per eadem servitia*, a succession by privity not merely of estate but of tenement and, one may even say, of person—for the village will not hold both seller and buyer. The seller must quit, as it were, his former self, and be dead to his old community.

Part VI. Interpretation, definitions, miscellaneous and supplemental provisions.

It will be seen that in the matter of arrangement Dr. Bogišić has shown a good deal of independence. In a great measure he has been guided, and rightly so, by the special conditions of his undertaking. But it is not without interest to note that in the position of Part V he gives effect (we think, for the first time in actual legislation) to the theory valiantly maintained by Professor Holland, and that, whatever Continental theorists may think of Part VI, much of it, if not all, is approved by the experience and practice of our own Parliamentary Counsel's Office.

We must add that, so far as we can see, there is nothing about bankruptcy. O blessed state of the men of the Black Mountain, and long may they want a Bankruptcy Act!

F. P.

A Treatise on the Law of Domicil: national, quasi-national, and municipal; based mainly upon the decisions of the British and American Courts. With illustrations from the Roman Law and the modern Continental authorities. By M. W. JACOBS. Boston (Mass.): 1887. La. 8vo. 600 pp.

THIS book is the work of a thoroughly deserving writer, but, if criticism is to be of any value, a critic is bound in duty to point out that Jacobs' *Law of Domicil* is at best but a favourable specimen of a very poor class of book, whereof far too many are manufactured in the United States.

The new work on the Law of Domicil is a compilation rather than a treatise. The writer has consulted a mass of authorities, he has read and noted every American and English case bearing on his subject; he has certainly read all the current literature of his topic. Whether he has digested his reading is quite another matter. The marks of his study are shown not by the skill with which he has mastered and made his own the views of other writers, but by the industry with which he has cut out from their pages, with, it must be added, ample and fair acknowledgment, whole passages of extracts. If it be the object of a law-book to give us the words and thoughts of every person who has written on the topic, then, undoubtedly, Mr. Jacobs has attained his aim. What Westlake, Story, and others have said about domicile we can learn from his pages. All that can be done by honest, industrious, and sensible use of note-books, paste and scissors, has been achieved by our author, and in this respect he rises far above some of his countrymen who have pursued the same method with far less of energy, of accuracy, or of sagacity. Great is the power of paste, scissors, and note-books, but this power is after all limited. It may, under very favourable circumstances, produce, as in Mr. Jacobs' hands it has produced, a good compilation, but it never can produce a book in the sense in which Savigny, or Story, or Kent, or Westlake, have produced books on the conflict of laws. The plain truth is that Story, of whom no competent critic will ever speak in any language but that of the profoundest respect, set in one respect a bad example. His crude references to the opinions of

his predecessors and to the dicta of judges are the weak point of his admirable work, and conceal the strong common sense and the judicial instinct which will always make Story's *Conflict of Laws* a work of inestimable value. As generally happens with great men, Story's successors have shown far greater capacity for imitating his faults than his virtues. Circumstances, moreover, such as the immense number of modern English and American reports, have stimulated the vicious habit of compilation to which Story's authority gave countenance. Mr. Jacobs has fallen a victim to the ordinary fault of American text-writers; he has compiled too much, he has thought too little. On no one of the curious speculative questions raised by the law of domicil has he thrown any light whatever, except such light (if light it can be called) as is struck out by bringing into collision the opposed opinions of different authorities. If any one thinks this criticism too severe let him read through Mr. Jacobs' chapter on the definition of domicil, or let him look at the way in which our author treats the nice but by no means insoluble question as to the domicil of invalids. Whoever does this will see what industry and reading can accomplish, and will also come to the conclusion that neither industry nor reading can supply the place of analysis and of reflection. Nothing, be it added, is further from the intention of the present writer than to underrate the merits of Mr. Jacobs. His book is a good book of its kind, but the kind is a bad kind, and just because our author displays considerable merits it is to be hoped that he will reconsider his ways, dismiss paste and scissors, think his subject well out, compress his materials, and when a second edition of his treatise is asked for (as it probably may be in no long time), give us not a compilation from other law-books, but a work of his own on every aspect of the law of domicil. An American lawyer has great advantages in studying the conflict of laws. There is no reason why Mr. Jacobs should not ultimately produce the leading work on the subject of domicil.

A. V. D.

Le droit international théorique et pratique. Par CHARLES CALVO.
4^{ème} Edition. Tomes II et III. Paris: Pedone-Lauriel. 1888.

WE have already noticed the first volume of this valuable work (vol. iv. p. 102). The second volume deals with private international law and international criminal law. Under private international law the author treats of nationality, naturalisation, domicile, the conflict of civil laws (persons, 'moral persons,' marriage, divorce, family, succession), of civil procedure (jurisdiction, foreign judgments, rogatory commissions), and of mercantile laws. Under international criminal law he treats of jurisdiction, extradition, and deserters.

The subjects of vol. iii are copyright, patents, trade marks, &c., telegraphs, railways, uniformity of money, frontier regulations, sanitary measures, summed up as 'international regulations concerning the social and economic interests of peoples,' the mutual duties of states, the right of representation (diplomacy, embassies, consulates), extraterritoriality (obligations and rights of governments, diplomatic agents, war vessels and foreign armies, universal exhibitions), international agreements (treaties, negotiations, interpretation of treaties), disagreements between States and their settlement (congresses and conferences, mediation, arbitration and its future, international tribunal, violent solutions, pacific blockades).

M. Calvo has been blamed for the small place he gives to the philosophical aspects of his subject. This is a fault which will not detract from the value of his work in the eyes of his Anglo-Saxon readers. He has brought his

book closely up to date. Among the most recent matter he has dealt with we notice the De Campos marriage (vol. ii. p. 257), the Schnäbele affair (vol. iii. p. 304), the French Consulate affair at Florence (vol. iii. p. 238).

In the portion of his work on Private International Law the treatment of conflicts of law by different national laws has received considerable extension.

A *propos* of the recent so-called 'violation' of the French Consulate at Florence we may call attention to the following statement of M. Calvo:—
'L'on a vu il y a un certain nombre d'années saisir et vendre les archives du consulat général de France à Londres comme gage de l'impôt mis à la charge du propriétaire de la maison louée pour le service de la chancellerie' (p. 236). (The italics are our own.) M. Calvo gives no date or authority for this statement. It seems highly improbable that such a thing should have happened, and we would recommend M. Calvo to check the accuracy of the information.

T. B.

The Science of Jurisprudence. Chiefly intended for Indian Students.

By W. H. RATTIGAN. Lahore: 1888. La. 8vo. xvii and 271 pp.

THIS book does not profess to be an original contribution to legal science so much as an exposition of the best current doctrine adapted to a special purpose. Mr. Rattigan has furnished Indian readers with a clear and generally sound exposition, and with abundant illustration from the law of British India. The Indian illustrations, moreover, give the book a certain value for European students of comparative jurisprudence, who may be put by it on the track of various interesting matters not otherwise easily accessible.

For example, we have almost forgotten in modern English law the difference between a possessory and a *droitural* action. In Littleton's time, and, in theory, long afterwards, there might be a state of things enabling *A* to recover possession of certain land from *B* by an assize of novel disseisin, while *A*, after such recovery, would still have no defence against *B* in a writ of right (Litt. ss. 486, 487). This may puzzle a modern student at first, but he may read in the Indian Specific Relief Act of 1877, s. 9, which re-enacts and supersedes an Act of 1859 to the same effect:—

'If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may by suit instituted within six months from the date of the dispossession recover possession thereof, notwithstanding any other title that may be set up in such suit.

'Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.'

This is precisely Littleton's distinction between the assize of novel disseisin and the writ of right re-established in modern language and procedure.

The tendency of works on general jurisprudence to slide into comment on a particular system is exemplified by Mr. Rattigan's remarks on the Indian Contract Act; but a concise and at the same time critical commentary on the principal features of the Contract Act is an excellent thing for Indian students to have, under whatever name and in whatever context. On one point in the Contract Act we must differ from Mr. Rattigan. He seems to think its definitions of Fraud and Misrepresentation perfect, or nearly so. They were taken from the draft Civil Code of New York, and are in our

opinion about as bad as most other parts of that ambitious and unsatisfactory performance. If ever the Contract Act is revised, these sections should be thoroughly recast.

Mr. Rattigan has studied not only the English but the Continental literature of the philosophy of law; and in particular he has drawn considerably, and so far as we have observed with good judgment, on the works of Ihering, which notwithstanding the praiseworthy exertions of Mr. Lightwood and others are not yet sufficiently known in this country. In the midst of this evidence of intelligent use of German authorities, we are surprised to find Mr. Rattigan citing an imaginary 'German Landrecht'; he means of course the Prussian code. Prussia and Germany are not synonymous terms except in the language of inferior French journalism.

Although Mr. Rattigan truly says that untranslated foreign quotations are a puzzle to Indian students, and that for that reason Mr. Holland's book is not altogether suitable to them, we doubt whether he has adequately observed his own precept; there are quite enough German and Latin phrases embedded in Mr. Rattigan's text to give trouble to readers who do not know any European language besides English. Why plague them with such a clumsy compound, belonging moreover to no real language at all, as 'culpa-compensation'? And it is gratuitous cruelty to give them the impossible derivation of 'felony' from English 'fee' and German 'Lohn' propounded but not vouched for by Spelman. Such things can hardly be excused since Mr. Skeat's Etymological Dictionary has been published in a cheap and handy form. To this particular word Mr. Skeat assigns a Celtic origin which does not seem to have occurred to Littré; but, as in many like cases, the truth is that behind the medieval Latin form of the word all is conjecture. In the department of early history Mr. Rattigan's work is rather uncertain. He adopts the McLennan theory of primitive marriage in a fashion much too dogmatic for an elementary book; and though he mentions some of the evidence that suggests a religious origin for promissory obligations, he goes on to represent the Stipulation as derived from Nexum without any indication of doubt. Both views cannot be right. He makes moreover the really bad mistake of applying the epithet 'consensual' to the *verbal* contracts of Roman law. In one meaning of the word every contract is consensual; but in speaking of Roman law, or of any other definite system, we should use its proper terms of art in their proper technical sense.

There is not much amiss in the treatment of Anglo-Indian law so far as derived from the common law; and we see that Mr. Rattigan has made good use of some good American books, such as Judge Clark Hare's treatise on Contracts. But Mr. Rattigan might have known that *Thorogood v. Bryan* is overruled, and he should not have cited decisions which turn wholly on remoteness of damage as examples of contributory negligence. It is not enough that the word 'negligence' occurs in a judgment. Whether it belongs to the point of substance or not is exactly what a critical writer on jurisprudence has to examine. It is true that the doctrines of remoteness of damage and of contributory negligence may both be referred to the more general principle that a man is liable (particular exceptions excepted) only for what are sometimes called 'natural and probable,' sometimes 'proximate' consequences of his acts or defaults. But this can be made intelligible to students only by patient analysis, not by lumping the two doctrines together.

We further observe that in the sections on Possession Mr. Rattigan has not clearly distinguished Possession itself from the Right to Possess, at all

events he has not clearly expressed the distinction. He has used language from which a student would naturally infer that it is impossible for a servant to steal his master's goods; for there can be no theft without a wrongful change of possession, and Mr. Rattigan says that even if a servant assumes adverse control of his master's goods the 'legal possession' remains with the master. What really happens is that the servant acquires an actual though wrongful possession—not merely manual possession or 'detention,' but legal possession which he could probably defend against a mere stranger—and the master is dispossessed, but retains the immediate right to possession, which is often called in our books 'constructive possession.' The subject, however, is admitted to be a difficult one.

Benjamin's Treatise on the Law of Sales. American Edition. By EDMUND H. BENNETT. Boston, Mass.: Houghton, Mifflin & Co. 1888. 8vo. xii and 1010 pp.

THIS is the latest American edition of Benjamin's standard treatise. Of the excellence of the original nothing need be said here; the legal profession both in England and America unite in praising it as one of the best law books ever written in either country. In preparing the present edition Mr. Bennett has followed an entirely novel plan. Taking the text of the last English edition he has appended to each chapter an 'American Note,' containing all his own additions arranged more or less closely on the lines followed by the author, and designed to present the American law. This arrangement, it must be confessed, is not wholly logical nor wholly convenient. In the law of sales there has been no such divergence between the American and English Courts as calls for a separate treatment; while certain doctrines accepted in the one country are by no means universally prevalent in the other, yet there is no more an American as distinguished from an English law of sales, except as referring to a grouping of cases and not of principles by nationality, than there is a Massachusetts as distinguished from a New York law of sales. Logically, therefore, the segregation of American decisions here adopted is not defensible, and it has the practical inconvenience of entailing a double search, first in the text and then in the 'notes,' in order to collect all the authorities on any point.

Mr. Bennett has aimed at making his 'notes' something more than mere appurtenances to the text; they form to some extent a book within a book; each deals, it is true, with the topic discussed in that section of Benjamin's work preceding it, but each undertakes to give a succinct statement of those doctrines, as found in the American cases, which fall under the general heading, often arranged in different order and with both additions and omissions, and not merely to supply a collection of authorities supplemental to the original. In his desire, however, to avoid a burdensome length the editor has kept his own views so much in abeyance as to reduce his work to a large degree to that of mere compilation; but as such it is worthy of high praise, and the notes on Conditional Sales of Specific Chattels, Sales of Chattels not Specific, Fraudulent Sales, and Warranty are of especial value.

Where so much attention has been paid to the citation of authorities it is somewhat surprising to find several important cases unmentioned. *Burdick v. Sewell*, 10 Q. B. D. 363; 13 Q. B. D. 159; 10 App. Cas. 74, seems worthy of reference for the sake of its discussion as to the effect of endorsing a bill of lading. And surely in dealing with acceptance and re-

ceipt to satisfy the Statute of Frauds some mention should be made of *Page v. Morgan*, 15 Q. B. D. 228, the latest decision upholding the so-called doctrine of *Morton v. Tibbett*, 15 Q. B. 428. That the last named case did not in fact involve the doctrine attributed to it and followed in *Kibble v. Gough*, 38 L. T. N. S. 204, and *Page v. Morgan*, namely that any dealing with goods such as recognises the existence of a contract is sufficient to show an acceptance, is made clear by Benjamin; and that Lord Campbell himself did not, later at least, regard this as sound is indicated by his language in *Parker v. Wallis*, 5 E. & B. 21, where he said that though the owner need not have precluded himself from objecting to the quality of the article delivered, yet 'he must have done something indicating that he has accepted part of the goods and taken to them as owner.' *Morton v. Tibbett* might well have been decided on the ground that the acceptance and receipt of the sample was enough, following *Hinde v. Whitehouse*, 7 East, 558, though this view seems not to have suggested itself to the Court; but independently of that the resale by the buyer was undoubtedly enough to warrant finding an acceptance without going to the extreme doctrine of the later cases, since it was a clear recognition not merely of the existence of a contract but of the effective force of that contract in vesting the title in the buyer; 'it was an act consistent only with his ownership and inconsistent with that of the seller,' *Remick v. Sanford*, 120 Mass. 309, or as Lord Campbell phrased it, a 'taking to them as owner.' In *Simpson v. Krumdick*, 28 Minn. 352, the doctrine of the later English cases was disapproved.

The established doctrine that a sale—an intentional passing of title—if induced by fraud cannot be avoided against a *bona fide* purchaser for value from the fraudulent vendee, meets with strictures from Mr. Bennett. He regards it as inconsistent with the rule allowing sales by minors and insane persons to be avoided even at the expense of innocent third parties. The distinction, however, seems well founded; it is precisely analogous to the rule as to negotiable paper, resting upon a distinction between real and personal defences; infancy and insanity are real defences; they are good against all the world and do not depend upon any personal relation or conduct as in the case of fraud. The sale in these cases is voidable because of an absolute rule of law, but in case of fraud the foundation of the defrauded vendee's right is equitable and is lost when the conflicting claims of a *bona fide* purchaser intervene.

On one point a general divergence between the American and English decisions has grown up. This is in respect to warranties and conditions. In all sales of chattels where the goods are designated by description and not by physical reference—and perhaps even in the latter case, if there is a mistake in an essential particular, but see *Hecht v. Batcheller*, Supreme Judicial Court of Massachusetts, to be reported,—the terms of the description are a part of the contract and must correspond to the attributes of the article specified. In England the truth of the description is deemed a condition of the contract, but in America, Mr. Bennett says, it is regarded as covered by an implied warranty of identity. Perhaps in view of the more extended rights of a buyer in America in case of breach of warranty the difference is rather one of nomenclature than of substance, but in theory at least the distinction is important and worthy of remark. The truth of the description is, it would seem, properly and truly a condition of the contract; it is such not because of an undertaking on the part of the seller that the article shall be of the kind or quality specified, but because the contract is for that description of article, and if it is not of that description there is as truly no

meeting of minds as if the parties misunderstood each other. The line between such a condition and an implied warranty of fitness undoubtedly is not always clear, but it exists, the difference being founded on the fundamental basis of each; the one goes to the identity of the thing contracted for, and might not be fulfilled if the article were of a superior grade, while the other goes to its quality and would be satisfied if the article was not inferior in quality and fitness. That there is in general an implied warranty that goods not examined by the buyer beforehand shall be of fair merchantable character and reasonably fit for the purpose for which they are bought, if such purpose is disclosed, is universally upheld and has very recently been affirmed by the Supreme Court of the United States in the case of *Dushane v. Benedict*, 120 U. S. 630.

In outward appearance the present is a great improvement on the last American edition, while its more orderly classification and more discriminating citation of authorities render it a much more serviceable book, aside from any question of the merits of the plan on which it has been arranged. Some errors of the press and a certain carelessness of style on the part of the editor detract somewhat from the finish, but do not impair the substantial merits which will cause the book to be received with thanks and congratulations to its learned editor from his professional brethren both at home and abroad.

A Treatise on the Law of Fraud on its Civil side. By MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1888. La. 8vo. lxxv and 714 pp.

THIS is a full and elaborate treatise, working out every branch of the subject with Mr. Bigelow's well-known industry. We shall not take on ourselves to say whether he has finally succeeded in tying the Proteus of Fraud in the bonds of a definition. 'Fraud consists in endeavour to alter rights, by deception touching motives, or by circumvention not touching motives.' This is very well; but who shall define 'circumvention'? We should doubt whether, in its ordinary sense, it included various cases of fraudulent abuse of the process of the law which Mr. Bigelow makes it include. In other directions it might possibly be too wide. There are, we think, actionable wrongs in the nature of circumvention which have not hitherto been included under Fraud. Mr. Bigelow may say, however, that if we see our way to a real generalization of principle we must enlarge our terms of art accordingly.

To speak, more in brief than we fain would, of one or two details: we wholly agree with Mr. Bigelow as to the meaning of 'constructive,' or as it is sometimes rather unhappily called 'legal,' fraud. People are sometimes puzzled by transactions which they cannot see to be fraudulent being called 'constructive frauds.' But the idea of 'constructive fraud'—as in every legal use of that adjective by careful lawyers—is precisely that something which is not, or is not proved to be, *A*—where, in this case, *A*=Fraud—shall be treated as if it were *A*. Where real fraud is shown, constructive fraud is out of the question. So 'constructive notice' does not mean any state of knowledge or consciousness existing or supposed to exist in the person affected by it, but that the law thinks good—wisely or not—to treat him as if he had actual notice.

Again, we agree with Mr. Bigelow about the distinction between representations of matter of fact and representations of matter of law. The latter are generally not binding on the person making them, not because of any

absolute rule or presumption, but because, in the absence of any assumption of superior knowledge to which faith is given, they 'stand upon the footing of opinion' merely. And there is no reason why in the exceptional cases an exception should not be made.

We do not agree with Mr. Bigelow that 'any contract may be rescinded for innocent misrepresentation which was a sufficient inducement thereto.' No authority we know of in this country has gone the length of holding that *in general* a contract induced by a statement made not only with belief but with reasonable belief in its truth (and since *Peek v. Derry*, 37 Ch. Div. 54, at any rate, it seems that no others are innocent) can be rescinded on account of that statement being found erroneous. Mr. Bigelow seems to aim at a generalization which would make it superfluous to discuss the incidents of different species of contract. It may be a tenable opinion that the day is coming when every warranty, unless expressly limited in its effect, will be presumed to be a condition, and every term of description to be of the essence of the contract. And we do not say that such a rule, if consistently applied, would be a bad one. At least it would teach people some care in the use of language. But for the present Mr. Bigelow seems not to have quite shaken off the temptation to construe equity authorities too widely and common law authorities too narrowly; so powerful and insidious a temptation that even Sir G. Jessel succumbed to it at least once.

The Law of Execution upon Judgments and Orders of the Chancery and Queen's Bench Divisions of the High Court of Justice. By C. JOHNSON EDWARDS. London: Stevens & Sons. 1888. lx and 526 pp.

THE slightly profane story of the Judge who was taunted by a bishop with not being able to utter professionally any menace more terrific than 'you be hanged,' and retorted 'Yes, but when I say "you be hanged" you *are* hanged!' has a moral. This is, that the whole elaborate machinery of the administration of justice by virtue of which civilisation is able to exist would be of little use if it could not secure practical compliance with the decisions at which it arrives. There is, therefore, no more important part of the law than that which concerns the carrying of the law into effect. Yet it is one which many very learned lawyers know little or nothing about. Therefore Mr. Edwards has done well to make it the topic of an elaborate, carefully-written, and reasonably exhaustive book. In order to be quite exhaustive it would have to be very large indeed. Mr. Edwards has omitted from his Survey the manner of executing judgments or orders of the Queen's Bench Division on the Crown side, the method of dealing with such contempt of Court as consists of disrespectful behaviour, the enforcement of orders in bankruptcy, and all execution in inferior courts, of which the County Courts are the most numerous and important. Enough remains to make a substantial volume. Mr. Edwards' principal heads deal with writs of execution, how and when they issued and upon what conditions stayed, the returns to them, and discovery in aid of execution; the sheriff and his officers, and their duties and liabilities; the writs of Possession, *Fi. Fa.*, *Elegit*, and Delivery; the methods of enforcing judgment where non-compliance of the order of the Court is treated as contempt, namely, attachment, committal, and sequestration; equitable execution by means of the appointment of receivers, charging orders, and the like; the attachment of debts; and execution against married women.

Mr. Edwards writes briefly and pointedly, and has the merit of beginning

in each case at the beginning, without assuming that the reader knows anything. He explains who the sheriff is; what the Queen, in a writ of *Elegit*, for example, orders him to do; how he does it; and what consequences ensue. The result is to make the whole treatise satisfactorily clear and easy to apprehend. If the index is good—as it appears to be—practitioners will probably find the book a thoroughly useful one. It is interesting to observe how enviable is the position of a married woman by reason of her not being the legal owner of property settled to her separate use, and how hard it is to make her pay her debts. The appendix contains many forms of writs, summonses, orders, notices, and affidavits, and the text of the Sheriffs' Act, 1887. It may be added that though the enforcement of orders in bankruptcy is beyond the scope of the work, Mr. Edwards does not fail to make constant reference to the effect upon the various proceedings by way of execution of the not unusual circumstance of the judgment debtor's bankruptcy.

A Manual of the Constitutional History of Canada from the earliest period to the year 1888, including the British North America Act 1867, and a Digest of Judicial decisions on questions of Legislative Jurisdiction. By JOHN GEORGE BOURINOT, LL.D. Montreal: Danson Bros. 1888. xii and 238 pp.

THIS work is a revised reprint of certain chapters of Mr. Bourinot's well-known treatise on Parliamentary Practice and Procedure in Canada. The object of Mr. Bourinot's larger work was to describe the machinery and methods by which the Canadian Parliament discharged its legislative duties; but as the Canadian Constitution had been only a few years in existence, and great interest was taken in the judicial interpretations placed upon the Union Act, Mr. Bourinot added to his work a sketch of the constitutional history of Canada, a description of the leading features of the Constitution of 1867, and an account of the chief decisions of the Judicial Committee of the Privy Council.

It is this addition that has now been reprinted, and though it has been revised to date and will prove valuable to students, its omissions and its want of balance prevent its being accepted as an adequate work on the Constitution of Canada. The historical portion of the work is practically restricted to 'Canada' in the sense in which that word was used prior to 1867, viz. as meaning the old colony of Canada now represented by the provinces of Ontario and Quebec. The constitutional history of Nova Scotia, New Brunswick, Prince Edward's Island and British Columbia is passed over in silence, and the title of the book is, to say the least, misleading.

The second portion of the work deals with the existing constitution, and though a readable account is given of the central and provincial governments, the description of the Administration and the Judicature is very meagre. The most serious omission here consists in leaving out all reference to the control exercised by the mother-country through the Imperial Parliament or through the Secretary of State for the Colonies.

The third part deals with the judicial decisions of the Canadian Courts and the Privy Council, but in no sense of the term can it be called 'a digest.' No attempt is made to refer to all the judicial decisions, and in the treatment of those quoted there is a great want of order and arrangement. The author would have been well advised had he restricted his cases to a few leading ones, illustrating the view taken by the Courts of the framework of the Union Act.

Notwithstanding these strictures we can recommend the work to students. Its frequent references to Canadian Blue-books would alone give it a special value. The Constitutions of our Colonies have been greatly neglected in our schools and colleges, and any contribution towards a better knowledge of our great dependencies must always be welcome.

Interpleader in the High Court of Justice and in the County Courts.

By M. CABABÉ. Second Edition. W. Maxwell & Son. 1888. 8vo. xiv and 207 pp.

THE Rules of 1883 having superseded the Interpleader Acts, and the Statute Law Revision and Civil Procedure Act of the same year having expressly repealed them, a second edition of Mr. Cababé's work became absolutely necessary. We think the edition very well done on the whole, the cases (see especially *Searle v. Matthews*, in which the important judgment of Field J. is very properly extracted at length from the note to *Goodman v. Blake*, 19 Q. B. D. 77) being carefully collected. But there is too much of the old law. Not only are the repealed Acts printed verbatim in an appendix without any mention of their express repeal, but 'one or two rules adopted by the Common Law Courts in the early history of the Interpleader Act 1831, which much impeded its beneficial operation' (see *James v. Pritchard*, 7 M. & W. 216; *Roach v. Wright*, 8 M. & W. 155), and which have now only an historical interest, are dwelt upon at great length, whereas the effect only of the Acts might have been given in the neat introductory chapter, and the obsolete cases should have been dismissed in two or three lines. Moreover, it is surely a mistake to speak of 'the present rules.' The Rules of 1883 should be described as such for the sake of identification, and to avoid the trouble of referring back to the preface for their date. Or it might be put quite pleasantly as well as accurately, 'the present (February, 1888) rules.'

A Practical Exposition of the Principles of Equity, illustrated by the leading decisions thereon. By H. ARTHUR SMITH. Second Edition. Stevens & Sons. 1888. La. 8vo. lvi and 832 pp.

MR. SMITH is naturally inclined to magnify his office as a practical expositor of the principles of Equity. His office is justified by the success which six years' trial have given, even among the multitude of competitors in the same field. Students have found that in his book are contained the doctrines of Equity as they exist in practice at the present day, clearly stated and conveniently arranged; and it has won itself a recognised position among text-books of its class. For the present edition it has been, as far as we can see, carefully brought up to date, with due notice taken of the important Acts which have been passed in and since 1882, and of the one thousand cases of which Mr. Smith computes that he has added a notice. Besides this there is an introductory chapter on the Maxims of Equity which panders to the fondness evinced by examiners for these aphorisms; there is also a section added to the chapter on Trusts which deals with the remedies of the *cestui que trust*, and Mr. Smith has dealt, as one of his experience can deal, with the thorny subject of the Married Women's Property Act. More novel still is the chapter on Company Law, a subject quite unfamiliar in treatises of this character, which is contributed by Mr. Powell. We resent being vaguely referred in this chapter to 'Williams' Personal Property,' we doubt the wisdom of considering a point which rests only on a decision in the

'Weekly Notes,' and we are astonished to find a statement on p. 591 that 'no banking partnership composed of *less* than ten persons may carry on business, unless it be either registered under the Companies Acts or authorised by some other Act of Parliament or by letters patent.' And we think that Mr. Powell might have at least mentioned the subject of reducing a Company's capital. Howbeit Mr. Powell has, like his principal, the gift of clear and generally accurate statement, and it is no mean thing to compress such a subject as that which he has taken up into the compass of some thirty pages. Taken as a whole, Mr. Smith's book bids fair to be one of increasing usefulness to students. It contains a careful statement and a not illogical arrangement of the law which is known in Lincoln's Inn.

La représentation proportionnelle : études de législation et de statistique comparées. Paris: F. Pichon. 1888. xvi and 524 pp.

THIS is a compilation of all available legislative and parliamentary information relating to proportional representation. A society has been started in France 'to study what has been said or done in different countries as to the application of the principle of proportional representation to political and non-political elections—to make known the systems proposed in view of rendering representation as faithful as possible—to analyse the parliamentary debates to which these systems have given rise, and to set forth the modifications realised in the legislations of foreign countries as well as the effects they appear to have produced.' The volume before us seems to be the first-fruits of the labours of the society. It contains a general article by M. Maurice Vernes on the reforms which have been proposed on different hands, and articles on the state of the question in Great Britain (Auguste Arnauné and André Lebon), the United States of America (Bruwaert), Brazil (Baron d'Ourém), the Scandinavian States (Pierre Dareste), Switzerland (Ernest Roguin), Belgium (Max Botton), Portugal (Laneyrie), Italy (Barranté), Spain (Fernand Daguin), La Plata (J. J. de Arechaga), and France (Maurice Vernes). Tables and plates (Victor Turquan) are annexed, showing graphically the results of recent elections in France. The volume is a valuable contribution to a subject the importance of which with the prevailing tendency to extend the elective principle is obvious.

A Collection of Precedents and Forms with references and additions to 'A Treatise on the Law of Settlements.' By JOHN SAVILL VAIZEY. London: H. Sweet & Sons. 1888. 8vo. xv and 341 pp.

MR. VAIZEY'S work presents many features of especial interest. In particular the clauses in settlements of real estate dealing with the portions for younger children claim attention, for Mr. Vaizey's views on this subject differ from those upon which modern Precedents of the highest authority are based. In Precedent I (a marriage settlement) we have an elaborate example of a form of trusts of a portions term, framed in accordance with Mr. Vaizey's views. A practical inconvenience likely to result from the use of this form is that a younger son, though of age, does not, until his father dies or the eldest son disentails, know whether he will get a portion or not, with the result that he cannot readily deal with his portion on his marriage or for any purpose. Again, an eldest or only son who dies in the lifetime of his father without having disentailed will, if he leaves a widow but no child, take a portion; a result which we imagine few parents contemplate or desire. But the strongest argument against the form is its length. A form

in which the definition of 'portionist' occupies a page of print in lieu of the modest six lines which we have been accustomed to think sufficient is not likely to be widely used in practice. The collection comprises other forms of some novelty which cannot fail to be valuable to the practitioner, and we think it will be found throughout the work that the author has shirked none of the difficulties which his views involve. As compared with modern drafts all the forms are long; moreover they betray a singular indifference to uniformity of language, even in individual Precedents. In a single Precedent (IV) no less than four different phrases are used in conferring powers exercisable by deed or will. The longest of the four is as follows: 'By any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment or by his last will and testament in writing or any codicil or codicils thereto.' Precedent XVIII and the alternative forms which immediately follow furnish examples of three different modes of declaring trusts by reference; a comparison of these forms shows curious differences between them, and suggests that two are inaccurate. We expect that Mr. Vaizey's work will be valuable for reference rather than for constant use.

Commentaries on the Common Law, designed as Introductory to its Study.

By HERBERT BROOM. Eighth Edition. By W. F. A. ARCHIBALD and HERBERT W. GREENE. London: W. Maxwell & Son. 1888. 8vo. xcvi and 1181 pp.

THIS edition has been prepared with all the care due to an established text-book; and the cases, particularly those bearing on recent statutes (such as the Employers' Liability Act), have been worked in with discrimination.

A chapter has been added on the law of Landlord and Tenant. This makes the work more complete, but at the same time illustrates the difficulties which surround the selection of 'the common law' as the subject-matter of a text-book for modern use. For instance, it is stated (p. 492) that 'a married woman *alone* cannot make a lease, unless in pursuance of the Married Women's Property Acts, where leasing powers are given to her under the provisions of a settlement, or she be living apart from her husband under a deed of separation.' This may be technically correct, but a statement is liable to mislead, which ignores the powers of a married woman *in equity* (apart from statute) to dispose of property which has been conveyed simply to her separate use.

The addition of this chapter has necessitated the excision of other matter relating to the early history of the Courts. But this is really gain, for it deprives the student of a pretext for omitting to read his Blackstone.

Ancient Facts and Fictions concerning Churches and Tithes. By ROUNDALL, EARL OF SELBORNE. London: Macmillan & Co. 1888. 8vo. xvi and 359 pp.

In this work Lord Selborne returns to some historical questions already touched upon in his 'Defence of the Church of England against Disestablishment.' With extraordinary care and minuteness, he sets forth the sources of the canon law as to tithes, and the history of the laws and customs which regulated the payment of tithes in the continental churches of Western Europe. The Second Part, which relates to the Anglo-Saxon Church, contains the evidence by which Lord Selborne supports his two main conclu-

sions : 1. That the 'tripartite division' of tithes never was a general rule of English law ; 2. That it was not by general legislation but by express and particular grants that parish churches first obtained a title to the parochial tithes.

We have also received :—

Company Precedents for use in relation to Companies subject to the Companies' Acts 1862 to 1883. Fourth Edition. By F. B. PALMER, assisted by CHAS. MACNAGHTEN. London: Stevens & Sons. 1888. La. 8vo. lxx and 1031 pp.—A new edition of a book which has made such a mark as this one hardly needs criticism. Mr. Macnaghten has taken a good stiff piece of work for his apprenticeship as a legal author. When he gives us something all his own, he will doubtless find that this earlier labour has been well spent.

Bullen and Leake's Precedents of Pleadings. By T. J. BULLEN and C. W. CLIFFORD. Part II. London: Stevens & Sons. 1888. 8vo. xxxv and 611 pp.—'Bullen and Leake' seems likely to take a new lease of life under the Judicature Acts, though it has many new rivals to compete with. The commentary on the forms has evidently been revised and brought down to date with great care, and, so far as we have observed, the extreme conciseness required in a work of this kind has been no hindrance to substantial accuracy in the statement of the law.

A Manual of Vigilance Law. By W. A. BEWES. London: National Vigilance Association. 1888. 8vo. viii and 71 pp.—The title of this manual—a title unknown to lawyers—shows that it is really addressed to a certain sort of lay people. Some other people may think that a supplemental manual of the dangers of 'vigilance' law-breaking would do them as much good.

A Popular Summary of the Law relating to Local Government. By G. F. CHAMBERS. London: Stevens & Sons. 1888. La. 8vo. iv, 80 and 16 pp.

The Punjab Code: consisting of the unrepealed Bengal Regulations, Local Acts of the Governor-General in Council, and Regulations made under the Statute 33 Victoria, cap. 3, in force in the Punjab. Second Edition. Calcutta: Government Press. 1888. La. 8vo. xi and 419 pp.

Assimilation des lois concernant la lettre de change, le billet à ordre et le chèque, etc. Par THOMAS BARCLAY. Paris and Brussels. 1888. 8vo. 40 pp.

A Supplement to 'The Magisterial Law of British Guiana,' published in 1877, etc. By A. J. POUND. London: Stevens & Sons. 1888. 8vo. xlvii and 690 pp.

Estudio sobre la Lei de Matrimonio Civil. By ENRIQUE C. LATORRE. Santiago: La Union Press. 1887. La. 8vo. 182 pp.—Happy is the country whose law of marriage is simple enough to be even summarily discussed in less than two hundred pages.

The History of the Law of Tithes in England. By W. EASTERBY. Cambridge University Press. 1888. 8vo. xiv and 110 pp.—This is a Yorke Prize essay. Few academical prizes have justified their existence better than the Yorke Prize has already done in a very moderate time.

Lehrbuch des Deutschen Strafrechts. FRANZ VON LISZT. Berlin and Leipzig: J. Guttentag. 1888. 8vo. xxii and 648 pp.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE NEW ZEALAND POISONING CASES.

IN reference to my article entitled 'Evidence in Criminal Cases of Similar but Unconnected Acts,' published in No. 13 of this REVIEW (January, 1888), the Editor has received the following from Mr. Fredk. Chapman, of Dunedin, N.Z.:—

[COPY.]

'The closing paragraph of Mr. Herbert Stephen's article on Evidence in Criminal Cases touching the case of *R. v. Hall* is as follows:—

'“The judgment of the Supreme Court [i.e. Court of Appeal] ends with a brief statement that they think the judge at the trial did right to reserve the point. This seems plain enough, but they give the astonishing reason that ‘the English authorities state that no single judge could take upon himself the responsibility of declining evidence tendered by the Crown.’ I am not acquainted with any such statement, but if it exists, it is certain that single judges in this country constantly ignore it.”

'Mr. Stephen unfortunately must have had before him an incorrect newspaper report of the judgment; a similar misunderstanding arose, I believe, in the New Zealand Parliament, where the matter was discussed a few months after the judgment was given.

'The correct report of the judgment, which now appears in New Zealand Law Reports 5, Court of Appeal Cases 93, is as follows:—

'“The *state of the English authorities* is such that no single judge could take upon himself the responsibility of declining to receive *the* evidence tendered by the Crown.”’

Mr. Chapman's surmise is perfectly correct. I quoted from the report of the judgment of the Court of Appeal published in the Otago Daily Times of Monday, 14th March, 1887, at the end of which the words appear as I reproduced them. The same words appear in The Evening Star (Dunedin) of the 12th of March, 1887. Though the reports appear to be identical, that in the Evening Star is headed '[from Our Own Correspondent],' and that in the Otago Daily Times '(per United Press Association).' The report in each case purports to be verbatim, and these circumstances led me, perhaps hastily, to assume that what appeared in the newspapers was a copy, supplied by the judge to the reporters, of the written judgment, and might therefore be taken to be correct.

I am sorry that in this way I came to misrepresent the observation of Mr. Justice Johnson. My comment does not, of course, apply to the correct version of the judgment which Mr. Chapman has been good enough to send.

HERBERT STEPHEN.

A correspondent sends the following Note on the Married Women's Property Acts:—

Has this rather important point ever been mooted?

A dies intestate in 1884, leaving neither widow nor issue. His father and his mother survive him. To whom does his personalty go?

The text-books (Williams' Personal Property, 12th ed., 558; Williams' Executors, 8th ed., 1512; Pridaux, 12th ed., II. 417, &c.) say, To the father wholly. But why?

The law rests upon the 22 & 23 Car. II. c. 10, a positive, exclusive, and unrepealed enactment. The material sections are—

VI. 'And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed *equally to every of the next of kindred of the intestate, who are in equal degree*, and those who legally represent them.'

VII. . . . 'And in case there be no wife, then all the said estate to be distributed equally to and amongst the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.'

Under these sections for 200 years the father excluded the mother entirely, but this was because the law entitled him *jure mariti* to all his wife's personalty, and it would have been futile for the mother to insist on a right which could immediately have been rendered nugatory.

That the mother was recognised as one of the next of kin is, however, clear from the 1 Jac. II. c. 17. s. 7, which was, as regards her, a restraining section.

But the 7th section of the Married Women's Property Act, 1870, put the matter on a different footing. The section (which is remarkable for a classical instance of bad annotation) gave the wife, married after the 9th August, 1870, the position of a feme sole with regard to personal property coming to her by an intestacy; and this provision was greatly extended by the Act of 1882.

The question, which has now become very practical, is simply this—Why should a judicial rule, originally a derogation from the express words of a statute, be allowed, now that its *ratio* has disappeared, to perpetuate an anomaly which is opposed to the tendencies of modern legislation, as it is also opposed to the historical rules on which the law of succession to personal property is generally based? If the mother should now claim her share of the personal property of her deceased child, is there any legal principle which could stand in her way?

Judge Chalmers' article on Imprisonment for Debt in the September number of the Fortnightly Review is heartily to be commended to all lawyers and legislators who are interested in the practical details of everyday justice. On these details, after all, the success or failure of a legal system depends at least as much as on the elegance or profundity of the judgments delivered in superior Courts. That which Judge Chalmers has to say does not the less afford serious matter for reflection because it is said in a pointed and amusing form.

We ought to have called attention sooner to Mr. J. B. Ames's discussion of 'The History of Assumpsit' in the April and May numbers of the Harvard Law Review. It is familiar learning that assumpsit was in its origin an action upon the case for a wrong, not an action upon a contract or promise as such; and that the traces of this origin are quite visible in the settled modern forms of common-law pleading. But careful and close examination of the authorities is needful to ascertain the precise nature of

the cause of action as it was conceived of in the earlier stages, and to fix the steps by which it was extended, first from express promises to a promise implied by law from the existence of a debt, and later to promises implied by an avowed equitable fiction in cases where there was neither express promise nor actionable debt. Much has been written on the subject, but we do not think any previous inquiry has been so complete as Prof. Ames's. He gives us new light on the greatly debated origin of Consideration, and it is hardly too much to say that he has definitely put the Romanizing theory out of court. His own view nearly approaches that of Judge Hare, and brings into prominence the element of deceit involved in the cause of action in its earliest form. If I meddle with your horse without your will, it is a trespass; but if with your will, how can it be a wrong, though I lame the horse? The answer is that if I have held myself out as competent—'assumed' to handle the horse as a skilled farrier—and have lamed your horse by my want of skill, I have led you into damage by a kind of deceit, and that is a misfeasance for which I shall answer. Here is the beginning of the aspect of Consideration which has finally prevailed as the general definition, namely *detriment to the promisee*.

London is conventionally deemed to be a wilderness in the Long Vacation. But in our profession many juniors find it needful or useful to spend an appreciable part of the 'dead season' of August and September in the precincts of the Inns of Court. One would think it worth while to make those regions an oasis, rather than exaggerate the part of the desert. When a London club shuts its doors for two or three weeks' cleaning, the members are not barely confronted with a shut door; they are directed to some other club where they are made welcome under a treaty of reciprocal comity. Thus do the Athenaeum and the United Service clubs, to take one case familiar to many Benchers, exchange courtesies. Why should not the libraries and common-rooms of the Inns of Court do the like? Why should a barrister coming up in the vacation find mere vacancy? Why should he be driven into the street for his lunch and his newspaper, and put on private inquiry whether the library of some other Inn be haply open, and whether he will be allowed to use it as a favour? A little organization might greatly amend all this without appreciable detriment to any officer's or servant's holiday.

In *Newbigging v. Adam*, 34 Ch. Div. 582, the Court of Appeal discussed a nice question of the proper measure of indemnity upon the rescission of a contract of partnership obtained by misrepresentation. The Lords Justices all held that the plaintiff was entitled to be restored to his old position, and that, even though the misrepresentation were not fraudulent and would not have supported an action of deceit, this right included a right to be indemnified against any obligations imposed on him under the contract. Lord Justice Bowen thought the indemnity must be limited to obligations created by the contract and would not include liabilities arising out of the contract only in the sense of being natural consequences; for without such a limit the indemnity would not be distinguished from damages. Cotton and Fry L.JJ. thought it should extend—in the language of Fry L.J.—to 'all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of the contract.' As Bowen L.J. held that the liabilities of the firm had been assumed by the plaintiff as part of the contract, and so came within his rule, the decision was not affected by this shade of difference.

In the House of Lords (*Adam v. Newbigging*, 13 App. Ca. 308) it appeared that the only outstanding liability of the firm was a debt to the defendants themselves, who, having obtained the contract from the plaintiff by misrepresentation, were estopped from saying that he was a partner or liable as such. Therefore not only the fine and rather speculative point above mentioned, but the general rule as to a right to indemnity against obligations contracted towards strangers, remains open so far as the House of Lords is concerned.

In *Easton v. London Joint Stock Bank*, 34 Ch. Div. 95, the Court of Appeal was astute to arrive at a 'sound commercial view' of the law concerning purchase for value without notice. The House of Lords has reversed that decision: *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Ca. 333, holding in effect that it is not open to the Courts to depart from settled principles for the sake of real or apparent commercial convenience. The principal of an agent having limited authority may be estopped from denying that his authority was as large as it appeared to be. But this cannot be the case when the third person dealing with the agent knows in fact—from whatever source—that his authority is limited. He is then put upon inquiry what the limits of the authority really are, and the mere representation of the agent that he has full power will not do, for otherwise authority could seldom if ever be effectually limited at all. Here the money-dealer may have been in a position to deal with the securities entrusted to him as his own, but the bankers well knew that they were not his own—'that the person who dealt with them as owner,' in Lord Macnaghten's words, 'was not acting by right of ownership. They took for granted that he had authority, but for some reason or other they did not choose to inquire what that authority was.' Consequently the dealing was at their own risk. In view of the actual knowledge which was admitted, it made no difference whether the securities were negotiable or not.

The decision of the Court of Appeal in *Badeley v. Consolidated Bank*, 38 Ch. Div. 238, is or ought to be the last nail in the coffin of the old doctrine that participation in profits is anything more than evidence—not different in rank from any other evidence—that the partaker is a partner. Sharing profits is evidence of partnership, and may be ample evidence. But where it occurs only as one term or incident, we are not to take it first by itself, and say that it raises a presumption of partnership, and that a partnership there must be unless this presumption is specifically negated by some other clause or circumstance. The transaction must be regarded and judged as a whole.

The decision of the Court of Appeal in the case of the *Christchurch Inclosure Act*, 38 Ch. Div. 520, deserves the attention of those who are interested either in charities or in rights of common. It contains, we believe, the first judicial recognition of both the importance and the novelty of the principles laid down and acted on by the House of Lords in *Goodman v. Mayor of Saltash*, 7 App. Ca. 633. That case may bear its fruit slowly, but the House of Lords does not invent new ways of claiming quasi-public rights for nothing. If Demos but knew law enough, he would cry out for statues to Lord Cairns and Lord Bramwell.

Though prevention is better than cure and an injunction than an action for damages the Court will not, to prevent a libel, prejudge what is a ques-

tion for a jury. 'To justify the Court in granting an interlocutory injunction,' says the Master of the Rolls in *Coulson v. Coulson* (3 Times Rep. 846), 'it must come to a decision on the question of libel or no libel before the jury have decided whether it is a libel or not. The jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant.' Clearly such a remedy is available only on the 'rarest occasions.' This is confirmed by the recent case of *Liverpool Household Stores Association v. Smith* (37 Ch. Div. 170). There a Liverpool newspaper had published letters commenting injuriously on the management of a local Household Stores Company and speaking of the 'savings of many working people as being jeopardised.' The Court of Appeal not being clear that a jury would have found it a libel refused the injunction. Lord Justice Cotton added, 'I think myself that a newspaper does occupy a peculiar position, especially with regard to matters of public interest which concern the interest of those amongst whom the newspaper circulates, such as the position and prospect of a public company like that of the plaintiffs.' Does this mean anything beyond the liberty of free speech and fair criticism recognised in *Merivale v. Carson* (20 Q. B. Div. 275)? The construction placed by the Court of Appeal in *Challender v. Royle* (36 Ch. Div. 425) on sect. 32 of the Patents and Trade Marks Act, 1883, that the plaintiff to get an injunction for slander of title must prove non-infringement, corresponds with the principle of *Coulson v. Coulson* and *Liverpool Household Stores Co. v. Smith*.

Ex parte Lewis, 21 Q. B. D. 191, determines a point which has so often been determined before as hardly to call for decision, namely, that when a matter is left for determination to the discretion of a magistrate no Court will compel him to exercise his judgment in a particular way. 'Discretion' in short means discretion and nothing else.

Ex parte Lewis, however, especially if read in combination with the charge of Mr. Justice Charles in *Reg. v. Graham*, 4 Times L. R. 212, touches upon matters of high and increasing importance, and directs the attention both of lawyers and of laymen to the following points which well deserve consideration.

1. The so-called 'right of public meeting' is quite a different thing from the alleged 'right of meeting in public places.' The two rights are in many countries, and notably in Belgium, kept perfectly distinct.

2. The limits of the right of public meeting, that is, of an indefinite number of persons to meet openly together and discuss any question they choose of public or private interest, depend at bottom on the definition of the term 'unlawful meeting.'

3. The term 'unlawful meeting or assembly,' like all expressions into which the word 'unlawful' enters, is vague and hard to define. No greater benefit could be rendered by systematic codification of the criminal law than the definition of an expression which everybody uses and few, if any, correctly understand.

4. When the expression 'unlawful assembly' is defined there still remains for decision a very knotty point. What are the exact rights of the Crown and its servants with regard to, first, prohibiting, secondly, preventing, thirdly, dispersing, an unlawful assembly? It is singularly unfortunate that

our perplexity is here increased by a further ambiguity of language. The word 'hinder' is often used, even by writers of authority, so as to include the three different courses of action which may be distinguished as 'prohibition,' 'prevention,' 'dispersing.' Thus Sir C. Warren forbids a meeting in Trafalgar Square by proclamation; he next places a body of police there to prevent a crowd assembling; he lastly, when the crowd assembles or attempts to assemble, uses the police to break up the assembly and arrest the ringleaders. In each case he will be said to 'hinder' the meeting, but the three courses of action are clearly distinct, and the legality of each may depend upon very different considerations.

5. What are the rights of private citizens engaged in holding a meeting which they think lawful, but which the Crown and its servants attempt by force to break up as being in their *bond fide* opinion unlawful?

6. The answer to this enquiry will be found to depend at bottom on the correct solution of one of the most difficult questions presented by English law, namely, what are the legal limits to self-help or self-defence in the assertion of a person's legal rights?

The man of common sense who thinks that the obscurity of legal problems is caused by the perversity of lawyers may satisfy himself that the question here raised presents inherent difficulties by the following process. Let him try to find an obviously satisfactory solution of the following case:—A, who has by law a right to enter Hyde Park at the Marble Arch, is forbidden to do so by policeman X, and told he may enter at any entrance in Park Lane. The policeman is acting *bond fide* under the orders of the Commissioner of Police, but the Commissioner has, owing to a *bond fide* misinterpretation of an Act of Parliament, given X orders which are *ultra vires*. A can force an entrance at the Marble Arch by stunning X with a bludgeon. Must A submit to illegal orders, or may he assert his rights as a citizen by stunning X at the risk of X's life? If our man of common sense finds the problem difficult, he may be consoled by knowing that it turns upon principles which have perplexed eminent Judges. That this is so will be clear to any one who looks at the Report of the Criminal Code Bill Commission and studies pp. 11, 44-46 thereof.

He who does this may, it is possible, not find all his doubts removed, but will, with *Ex parte Lewis* and *Reg. v. Graham* before him, come to one practical conclusion. The proper mode to assert legal rights is an action at law, or an indictment: the patriot who prefers to assert them by stunning or killing a policeman is likely enough to force on the solution of a legal problem at the expense of his own liberty or life.

In re Armstrong, 21 Q. B. Div. 264, is a case to be carefully studied by all who wish to understand the practical difficulties which arise from unscientific legislation in general and from the blundering draftsmanship of the Married Women's Property Act, 1882, in particular. 'It would not be right,' says the Master of the Rolls, 'to suppose that the legislature when they passed this Act did not understand it, but unquestionably its construction by the Courts presents the most serious difficulties.' It may, however, be permissible for critics, if not for judges, to suggest that even the theoretical omnipotence and omniscience of Parliament cannot achieve the feat of attaining at once two inconsistent objects. The confusions of the Married Women's Property Act, 1882, all, as we have pointed out again and again, spring from the desire absolutely to protect the property of a married woman and at the same time make her as capable of contracting, and therefore as responsible for her debts as a *feme sole*. Sect. 19 is dictated by the

one desire, sect. 5, sub-sect. (1) is dictated by the other desire. Hence the difficulty of giving effect to both enactments, and hence the division of opinion among distinguished judges recorded in *Armstrong's* case. The majority of the Court hold that real property vested under a settlement in trustees for the use of a married woman without any restriction on anticipation, is liable for her debts on her becoming bankrupt, i. e. the Court give full effect to sect. 1, sub-sect. 5. The Master of the Rolls, on the other hand, holds that under such circumstances the property is not liable for the bankrupt's debts, i. e. Lord Esher gives full effect to sect. 19. An impartial critic will be inclined to hold that there is as much to be said for the one view of the Act as for the other.

A gift to a husband and wife and a third party, according to *Re Jupp, Jupp v. Buckwell* (57 L. J. Ch. 774), made after the date of the Married Women's Property Act 1882, operates still as a gift of a moiety only to the husband and wife, but the effect of the Act is that half only of this moiety goes to the husband, the other half goes to the wife as her separate property, in other words the doctrine of unity still subsists as between husband and wife and third parties, but does not subsist as between husband and wife; a remarkable result, with no certain warranty from the Act to support it. The Act says that a married woman shall be capable of acquiring, holding, and disposing of property as if she were a *feme sole*. Larger words or words more manifestly designed to confer an independent status could not have been used. Yet the tendency of the decisions has been to minimise the effect of the Act, so potent are old habits of thought, to put the new wine into old bottles. Reading the judgment, for instance, in *Wennhak v. Morgan* (20 Q. B. D. 635) one might imagine the doctrine of unity was still flourishing in peace; it has 'only been interfered with by judge-made law.' A traveller whom Charles Lamb once met with in the Margate Hoy astonished the company by telling them, among other wonderful things, that he had sailed through the legs of the Colossus of Rhodes. Lamb, who had read history, gently hinted that the Colossus had disappeared some time ago; whereupon the travelled person condescended to admit that the figure was 'a little damaged.' The doctrine of the unity of husband and wife must be admitted to be just 'a little damaged.'

During the debates on the Special Commission Act, 1888, a proposal was, according to the newspaper reports, made that the examinability of a witness abroad should in some way depend on his domicile. If the Member who proposed this amendment intended to throw difficulties in the way of the Commission's proceedings, he showed great ingenuity. If, as is equally likely, our intelligent legislator used 'domicil' as a fine word for home or residence, he afforded a signal example of the blunders made by laymen when using technical terms of law. Whenever the jurisdiction of a Court or the rights of an individual are made dependent on domicile, persons who have to administer the law may at any moment find themselves involved in the most perplexing considerations of mixed law and fact, and may be led under the compulsion of strict legal rules to very unsatisfactory practical results. Take as an example of the consequence of making the answer to legal questions depend on a man's domicile, the following cases.

D'Etchegoyen v. D'Etchegoyen, 13 P. D. 132, is the case of a man who being born the son of French parents afterwards when an infant acquired an English domicile, then from the age of eighteen lived as a farmer in Canada,

Mercy tempering justice is an edifying spectacle, but a good many people will be of the Lord Chief Justice's opinion that a person like the contumacious Mrs. Davies (21 Q. B. D. 236), who persists in defying the Court, is not a proper object of clemency, unless obstinacy argues (as perhaps it does) aberration of intellect. Committal for contempt is only arbitrary in the sense that any judicial discretion is. If a judge could not direct a person in contempt to be imprisoned until he complied with an order, the power of the Court would be seriously impaired. A gentleman who had married a ward of the Court without its sanction might prefer a year's imprisonment to executing a settlement of her property, or a party to an action might find it worth his while to resist discovery. Committal is for modern practice a necessary complement, no less than in the earlier history of the Court of Chancery it was the very foundation, of the jurisdiction as to specific performance. It is quite consistent with this to say, as Sir G. Jessel said in *Re Clement* (46 L. J. Ch. 375), that imprisonment is only to be resorted to where no other pertinent remedy can be found.

Not long ago Lord Esher was protesting against rules of construction for wills. Now we have the Lord Chancellor in *Leader v. Duffey* (13 App. Cas. 301) stigmatising them as a mode of 'arguing in a vicious circle,' 'assuming an intention apart from the language of the instrument itself, and then bending the language in favour of such fallacious assumption.' Such dicta are uttered under the extreme provocation of having irrelevant cases cited, and must not be too curiously scanned. What they really mean is that presumptions of meaning are not to be pressed too far. A rigid rule of construction is a contradiction in terms. If it does not yield to an evident contrary intention, it is a rule of law not of construction, as Mr. Vaughan Hawkins pointed out many years ago. A rule of construction merely means that the Court has, in a series of cases, attached a particular meaning to a word or collocation of words, and will do so again if there is no reasonable ground for distinguishing the former cases. The Court does so because such meaning is probably the true one. If 100 testators using the word 'children' have meant offspring of the first generation, probably the 101st when he speaks of 'children' means the same thing. Some assumption the Court must start with, and the probabilities of the assumption involved in a rule of construction being the true meaning increase with the number of times it has been found true. The difficulty is to give due weight to this probability consistently with a proper regard to the terms of the whole instrument, and to the other evidence (where there is other admissible evidence) of the intention of the settlor or testator.

An owner of fixed property is under no liability to a bare licensee for defects in the premises unless in the nature of a trap (*Corby v. Hill*, 4 C. B. N. S. 556). His liability for personal negligence is not so clear: but the bare licensee seems not much better off than a trespasser. In *Tolhausen v. Davies* (57 L. J. Q. B. 392) a farm servant, who was unloading a cart of manure on the highway, threw his pitchfork into the empty cart and said 'Gee up,' whereupon the horse, which was usually a quiet one but was admitted to have some 'blood,' being frightened, bolted, came racing into the farmyard, and knocked down a neighbour's wife who had come to call at the farm. On these facts the Court held there was no evidence of negligence, in the sense of breach of duty, by the farmer which would render him liable in an action by the injured visitor, she being a bare licensee who he had no reason to suppose would be there (*Batchelor v. Fortescue*, 11 Q. B. Div. 474). A runaway horse and cart on the highway is *prima facie*

evidence of negligence (*Watson v. Weekes*, C. A. unreported), but what would be negligence to persons passing to and fro on a highway may not be negligence on private premises as against a bare licensee. 'Surely,' said A. L. Smith J., 'a man may leave his horse and cart unattended in his own yard or field, unless he has reason to know at the time he so leaves it that by so doing he is likely to injure an individual who in fact is there or is known as likely to be there.' For a licensee to complain, as Willes J. said in *Hounsell v. Smith* (7 C. B. 731), 'wears the colour of ingratitude.' He takes the premises as he finds them. But what if the owner of a park with wild cattle in it permitted people to roam about it? would it wear the colour of ingratitude if a licensee complained of being gored? It would seem that such a danger, in the absence of reasonable express warning, or knowledge otherwise brought home to the party injured, would come within the 'nature of a trap.'

That a man who shoots at a fowl with intent to steal it and accidentally kills somebody is guilty of murder, is a doctrine that does not commend itself to common sense (more especially as the doctrine depends on the fowl being a tame and not a wild one); but Lord Coke treats it as undoubted law, and Lord Bramwell in *Reg. v. Horsey* (3 F. & F. 287) laid down the law to the jury that where a person in the course of committing a felony caused the death of a human being, that is murder. For the credit of English jurisprudence it is satisfactory to find Stephen J. in *Reg. v. Serné* (16 Cox C. C. 311) doubting very much whether the law is so. Instead that learned judge thinks it would be proper to say that 'any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which causes death, is murder. For instance, if a man intending to commit a rape on a woman, but without wishing to kill her, squeezed her by the throat to overpower her and in so doing killed her, that would be murder.' Setting fire to a house to get the insurance money without regard to the lives of the inmates (the crime charged in *Reg. v. Serné*) is of course murder if any of the inmates is burnt to death. It is very desirable that the criminal law should not be at variance with the moral sense of the community. Doubting is a convenient first step towards getting rid of archaic portions of the law. We may add that the books of authority are not even consistent in absurdity on this point. *A* fires a pistol at *B* under such provocation that if he killed *B* it would be only manslaughter. The bullet strikes and kills *X*. By Coke's rule this should be murder: but there can be no doubt that the offence is manslaughter, and so it is laid down by Sir Michael Foster.

A stipulation in a bill of lading exempting the shipowner from liability for loss or damage arising from the negligence of the master and crew is invalid by American or at least by Massachusetts law; by English law it is valid and, surprising as it may seem that shippers should submit to it, common. In *Re Missouri Steamship Co.* (58 L. T. R. 377) a cargo of cattle were shipped by an American citizen at Boston on a British ship under a bill of lading containing such a stipulation for exemption. The ship was stranded on the Welsh coast, and thereupon the question arose which law was to govern the contract, the *lex loci contractus* or the law of the flag (*Lloyd v. Guibert*, L. R. 1 Q. B. 115). *Lloyd v. Guibert* was a case of a British subject chartering a French vessel at a Danish port in the West Indies for a voyage to Liverpool. In *P. & O. Steamship Co. v. Shand* (3 Moo. P. C. Cas. 272) both parties to the contract were British subjects, and the contract was made in England. There was more against the presumption in *Re Missouri Steamship Co.*, but not enough to rebut it. It is

a fair inference that the parties in such a case intend the contract to be governed by the law which gives validity to the exemption and not by the law which vitiates it.

It is not easy to find any clue to the labyrinth of cases on what is an 'interest in land' within s. 4 of the Statute of Frauds. Why, for instance, should a sale of growing fruit be a contract for an interest in land (*Rodwell v. Phillips*, 9 M. & W. 501), and a sale of growing potatoes not (*Evans v. Roberts*, 5 B. & C. 829)? If the earth is a warehouse for sold timber (*Marshall v. Green*, 1 C. P. D. 35), why should it not be for sold grass (*Carrington v. Roots*, 2 M. & W. 248)? Not much help is to be got out of the latest case (*Lavery v. Pursell*, 57 L. J. Ch. 570), deciding that the sale of a house to be pulled down and taken away for building materials is a contract for an interest in land. Mr. Justice Chitty, having the instincts of a conveyancer, could not get over a house being a hereditament. All these difficulties have come in the first instance from not having adopted Mr. Justice Littledale's common-sense construction of the section as meaning land taken as land, and next from not fixing attention on what is the real subject-matter of the sale. Of course it is in each case a question of the construction of the contract, but a person who buys growing potatoes *simpliciter* contracts for potatoes, not for potatoes *plus* so much soil. Whether the buyer or seller severs the thing sold cannot signify, though the distinction has been often taken. A license to enter and cut sold timber does not make the contract one for an interest in land (*Smith v. Surman*, 9 B. & C. 573): why should a license to enter and remove building materials? Every part of the house, like every tree, becomes the purchaser's goods as and when it is turned into goods by severance; the contract operates on it, parcel by parcel, until the whole is removed. There is no more difficulty than in the case of a license to 'a man to eat my meat, or to fire the wood in my chimney to warm him by' (Vaughan 351).

The second volume of the publications of the Selden Society, which like the first will be edited by Mr. F. W. Maitland, will consist of selections from the earliest manorial rolls extant. The Council of the Society will be grateful for information as to the existence of any rolls of the reigns of Henry III and Edward I. It is by no means unlikely that, besides the early court rolls which are known to be extant in public libraries, and which have been more or less examined, there are unexamined ones in collegiate and other corporate libraries, or in private hands. Information may be sent to the Honorary Secretary, Mr. P. E. Dove, Lincoln's Inn, or to the Editor of this REVIEW.

The University of Bologna having been enabled by special Royal Decree to confer degrees *honoris causa*, on the occasion of its octocentenary, in each of its four Faculties, degrees were accordingly conferred by the Faculty of Law upon the following persons:—Asser, T. M. C., Amsterdam; Bar, L. von, Göttingen; Bufnoir, C., Paris; Brunner, E., Berlin; De Parieu, E. E., Paris; Dietzel, E., Dorpat; Fischer, J., Bonn; Field, D. D., New York; Fitting, E., Halle; Friedberg, E., Leipsic; Gneist, R., Berlin; Goldschmidt, L., Berlin; Hinschius, P., Berlin; Holland, T. E., Oxford; Holtzendorff, F. von, Munich; Jourdan, A., Aix; Ihering, R. von, Göttingen; Lucas, C., Paris; Lorimer, J., Edinburgh; Leroy, B. P., Paris; Maassen, F., Vienna; Mommsen, T., Berlin; Rivier, A., Brussels; Roscher, W., Leipsic; Randa, A., Prague; Schulte, F., Bonn; Stein, L. von, Vienna; Thonissen, J., Louvain; Windscheid, B., Vienna; Unger, J., Vienna.

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No. 379. The Valuation Acts, I.—The Royal Commission on Loss of Life at Sea, II—Compensation to Publicans—The Civil List—A Strange Rencontre.

No. 380. The American Copyright Bill—Breach of Promise—The Valuation Acts, II—Bookmakers and American Copyright—The Lost Diary; or, the 'Devil's Temptation'—Criminal Liability of Employers—Poetry: *Conditio Defendentis*.

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